

861. Battery Committed on School, Park, or Hospital Property

1 **The defendant is charged [in Count ____] with battery against a person on**
2 **(school property/park property/hospital grounds).**

3
4 **To prove that the defendant is guilty of this crime, the People must prove**
5 **that:**

6
7 **1. The defendant willfully used force on a person.**

8
9 **[AND]**

10
11 **2. When the defendant acted, (he/she) was on (school property/park**
12 **property/the grounds of a hospital).**

13
14 **[AND]**

15
16 **3. The defendant did not act (in self-defense[,]/ [or] in defense of**
17 **someone else[,]/ [or] while reasonably disciplining a child).]**

18
19 **Someone commits an act *willfully* when he or she does it willingly or on**
20 **purpose. It is not required that he or she intend to break the law, hurt**
21 **someone else, or gain any advantage.**

22
23 **To *use force* means to touch in a harmful or offensive manner. The slightest**
24 **touching can be enough to commit a battery if it is done in a rude or angry**
25 **way. It is enough if the touching makes contact with the person, including**
26 **through his or her clothing. The touching need not cause pain or injury of**
27 **any kind.**

28
29 **[The touching can be done indirectly by causing an object [or someone else]**
30 **to touch the other person.]**

31
32 **[A *school* is any (elementary school/junior high school/four-year high**
33 **school/senior high school/adult school [or any branch thereof]/opportunity**
34 **school/continuation high school/regional occupational center/evening high**
35 **school/technical school/community college).]**

36
37 **[A *park* is any publicly maintained or operated park. It does not include any**
38 **facility that is being used for professional sports or commercial events.]**

40 [A *hospital* is any public or private facility for the diagnosis, care, and
41 treatment of human illness, and which is (licensed/exempt from licensing)
42 under state law.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give bracketed element 3 on request if the defendant asserts he or she was acting lawfully when using force.

Give the bracketed paragraph on indirect touching if that is an issue. Give any of the bracketed definitions on request depending on the facts in the case.

Related Instructions

Instruction 850, Simple Battery

Instruction 885, Assault Committed on School or Park Property

AUTHORITY

Elements ▶ Pen. Code, §§ 240, 243.2.

Willful Defined ▶ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335, citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 22, 23, pp. 651–652.

RELATED ISSUES

Labor Dispute

Penal Code section 243.2 does not apply to conduct arising during the course of an otherwise lawful labor dispute. (Pen. Code, § 243.2(c).)

STAFF NOTES

Elements

Penal Code section 243.2(a) defines battery on school or park property or hospital grounds:

(a)(1) Except as otherwise provided in Section 243.6, when a battery is committed on school property, park property, or the grounds of a public or private hospital, against any person, the battery is punishable by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in the county jail not exceeding one year, or by both the fine and imprisonment.

(2) When a violation of this section is committed by a minor on school property, the court may, in addition to any other fine, sentence, or as a condition of probation, order the minor to attend counseling as deemed appropriate by the court at the expense of the minor's parents. The court shall take into consideration the ability of the minor's parents to pay, however, no minor shall be relieved of attending counseling because of the minor's parents' inability to pay for the counseling imposed by this section.

The maximum jail sentence is one year, as opposed to six months for simple battery. This instruction incorporates the elements of battery from instruction 850, Simple Battery, and parallels instruction 885, Assault Committed on School or Park Property.

School or Park Property or Hospital Grounds Defined

Penal Code section 243.2(b) defines battery on school or park property or hospital grounds:

(b) For the purposes of this section, the following terms have the following meanings:

(1) "Hospital" means a facility for the diagnosis, care, and treatment of human illness that is subject to, or specifically exempted from, the licensure requirements of Chapter 2 (commencing with Section 1250) of Division 2 of the Health and Safety Code.

(2) "Park" means any publicly maintained or operated park. It does not include any facility when used for professional sports or commercial events.

(3) "School" means any elementary school, junior high

school, four-year high school, senior high school, adult school or any branch thereof, opportunity school, continuation high school, regional occupational center, evening high school, technical school, or community college.

Exclusion for Conduct Arising During Labor Dispute

Penal Code section 243.2(c) excludes conduct arising during a labor dispute:

(c) This section shall not apply to conduct arising during the course of an otherwise lawful labor dispute.

870. Simple Assault

1 **The defendant is charged [in Count __] with assault.**

2
3 **To prove that the defendant is guilty of this crime, the People must prove**
4 **that:**

5
6 **1. The defendant willfully did an act that would directly, naturally,**
7 **and probably result in the application of force to a person.**

8
9 **2. A reasonable person, knowing the same facts that the defendant**
10 **knew, would realize that the defendant's act would directly,**
11 **naturally, and probably have that result.**

12
13 **[AND]**

14
15 **3. When the defendant acted, (he/she) had the present ability to apply**
16 **force to a person.**

17
18 **[AND]**

19
20 **4. The defendant did not act (in self-defense/ [or] in defense of**
21 **someone else).]**

22
23 **The terms *application of force* and *apply force* mean to touch in a harmful or**
24 **offensive manner. The slightest touching can be enough if it is done in a rude**
25 **or angry way. It is enough if the touching makes contact with the person,**
26 **including through his or her clothing. The touching need not cause pain or**
27 **injury of any kind.**

28
29 **[The touching can be done indirectly by causing an object [or someone else]**
30 **to touch the other person.]**

31
32 **The defendant need not have actually intended to use force against someone**
33 **when (he/she) acted. [Voluntary intoxication is not a defense to assault.]**

34
35 **No one needs to actually have been injured by the defendant's act. But if**
36 **someone was injured, you may consider that fact, along with all the other**
37 **evidence, in deciding whether the defendant committed an assault[, and if so,**
38 **what kind of assault it was].**

40 **Someone commits an act *willfully* when he or she does it willingly or on**
41 **purpose. It is not required that he or she intend to break the law, hurt**
42 **someone else, or gain any advantage.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give bracketed element 4 if the evidence raises an issue of defense of self or others.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of “attempted assault” in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522.)

AUTHORITY

Elements ▶ Pen. Code, § 240.

Willful Defined ▶ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790.

Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335, citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 6–11, 15, pp. 642–645, 647.

RELATED ISSUES

Lawful Arrest

The use of violence to overcome reasonable force employed in a lawful arrest is assault. (*People v. Montiel* (1993) 5 Cal.4th 877, 916.)

STAFF NOTES

An assault is an attempted battery and a lesser included offense of battery. Accordingly, this instruction is modeled after the battery instruction in light of the Supreme Court's decision in *People v. Williams*, as well as the excerpts of authority given below.

Violent Injury

"[T]he term "violent injury" used in defining an assault is not synonymous with term "bodily harm," but includes "any wrongful act committed by means of physical force against the person of another." (*People v. Herrera* (1970) 6 Cal.App.3d 846, 851.)

Statutory Definition of Assault

Penal Code section 240 defines assault:

An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.

Statutory Definition of Willfully

Penal Code section 7(1) defines willful[ly]:

The word "willfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

Our definition of willfully tracks the statutory language, but renders it in plainer language.

Mental State for Assault

People v. Williams (2001) 26 Cal.4th 779, 790, has the most recent pronouncement on the mental state for assault:

[W]e hold that assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.

Pointing Unloaded Weapon

In *People v. Rodriguez* (1999) 20 Cal.4th 1, 11, fn. 3 [dicta], the Supreme Court declined to address the validity of the rule that merely pointing an unloaded gun in

a threatening manner at someone is not an assault. (See *People v. Fain* (1983) 34 Cal.3d 350, 357, fn. 6.) The rule has been called an “anachronism.” (*People v. Lochtefeld* (2000) 77 Cal.App.4th 533, 542, fn. 10 [urging Supreme Court to discard the rule].) See also instruction ___, Misdemeanor Brandishing.

871. Assault on Custodial Officer

1 **The defendant is charged [in Count __] with assault on a custodial officer.**

2
3 **To prove that the defendant is guilty of this crime, the People must prove**
4 **that:**

- 5
- 6 **1. The defendant willfully did an act that would directly, naturally,**
7 **and probably result in the application of force to a person.**
8
 - 9 **2. A reasonable person, knowing the same facts that the defendant**
10 **knew, would realize that the defendant's act would directly,**
11 **naturally, and probably have that result.**
12
 - 13 **3. When the defendant acted, (he/she) had the present ability to apply**
14 **force to a person.**
15
 - 16 **4. When the defendant acted, the person assaulted was lawfully**
17 **performing (his/her) duties as a custodial officer.**
18

19 **[AND]**
20

- 21 **5. When the defendant acted, (he/she) knew, or reasonably should**
22 **have known, both that the person assaulted was a custodial officer**
23 **and that (he/she) was performing (his/her) duties as a custodial**
24 **officer.**
25

26 **[AND]**
27

- 28 **6. The defendant did not act (in self-defense/ [or] in defense of**
29 **someone else).]**
30

31 **The terms *application of force* and *apply force* mean to touch in a harmful or**
32 **offensive manner. The slightest touching can be enough if it is done in a rude**
33 **or angry way. It is enough if the touching makes contact with the person,**
34 **including through his or her clothing. The touching need not cause pain or**
35 **injury of any kind.**
36

37 **[The touching can be done indirectly by causing an object [or someone else]**
38 **to touch the other person.]**
39

The defendant need not have actually intended to use force against a custodial officer when (he/she) acted. [Voluntary intoxication is not a defense to assault.]

No one needs to actually have been injured by the defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

A *custodial officer* is someone who works for a law enforcement agency of a city or county, is responsible for maintaining custody of prisoners, and helps operate a local detention facility. [A (county jail/city jail/_____ <insert other detention facility>) is a local detention facility.] [A custodial officer is not a peace officer.]

[A custodial officer is not lawfully performing his or her duties if he or she is using unreasonable or excessive force in his or her duties.] <Give the following bracketed paragraphs defining use of force if these instructions are not already given to the jury in the instructions for a greater offense. If the instructions have already been given, use the first bracketed paragraph below.>

<Instruction Already Given>

[Instruction _____<insert instruction number> explains when a custodial officer is using unreasonable or excessive force in his or her duties.]

<Use of Force>

[Special rules control the use of force.

A custodial officer may use reasonable force in his or her duties to restrain a person, to overcome resistance, or in self-defense.

If a person knows, or reasonably should know, that a custodial officer is restraining him or her, the person must not use force or any weapon to resist an officer's use of reasonable force.

If a custodial officer uses unreasonable or excessive force while restraining a person, that person may lawfully use reasonable force to defend himself or herself.

83 A person being restrained uses reasonable force when he or she uses that
84 degree of force that he or she actually believes is reasonably necessary to
85 protect himself or herself from the officer's use of unreasonable or excessive
86 force. The force must be no more than a reasonable person in the same
87 situation would believe is necessary for his or her protection.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

The court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168.) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47.)

Give bracketed element 6 if the evidence raises an issue of defense of self or others.

Give the bracketed paragraphs on use of force if those instructions have not already been given in the instructions for a greater offense. If the instructions have been given, use the bracketed paragraph directing the jury to that other instruction.

When appropriate, only describe the type of detention facility in the blank within the last bracketed sentence and do not insert the name of a specific detention facility. Otherwise the court could invade the province of the jury to determine that the facility in question is, in fact, a local detention facility. (See *People v. Flood* (1998) 18 Cal.4th 470, 482.) If there is a dispute about whether the site of an alleged crime is a local detention facility, see Penal Code section 6031.4.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of “attempted assault” in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522.)

AUTHORITY

Elements ▶ Pen. Code, §§ 240, 241.1.

Custodial Officer Defined ▶ Pen. Code, § 831.

Local Detention Facility Defined ▶ Pen. Code, § 6031.4.

Willful Defined ▶ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790.

Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335, citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 67, p. 686.

STAFF NOTES

An assault is an attempted battery and a lesser included offense of battery. Accordingly, this instruction is modeled after the battery instruction in light of the Supreme Court's decision in *People v. Williams*, as well as the excerpts of authority given below.

Violent Injury

"[T]he term "violent injury" used in defining an assault is not synonymous with term "bodily harm," but includes "any wrongful act committed by means of physical force against the person of another." (*People v. Herrera* (1970) 6 Cal.App.3d 846, 851.)

Statutory Definition of Assault

Penal Code section 240 defines assault:

An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.

Statutory Definition of Assault on a Custodial Officer

Penal Code section 241.1 defines assault on a custodial officer:

When an assault is committed against the person of a custodial officer as defined in Section 831 or 831.5, and the person committing the offense knows or reasonably should know that such victim is such a custodial officer engaged in the performance of his duties, the offense shall be punished by imprisonment in the county jail not exceeding one year or by imprisonment in the state prison.

Statutory Definition of Custodial Officer

Penal Code section 831(a) defines a custodial officer:

A custodial officer is a public officer, not a peace officer, employed by a law enforcement agency of a city or county who has the authority and responsibility for maintaining custody of prisoners and performs tasks related to the operation of a local detention facility used for the detention of persons usually pending arraignment or upon court order either for their own safekeeping or for the specific purpose of serving a sentence therein.

Statutory Definition of Local Detention Facility

Penal Code section 6031.4 defines a local detention facility as follows:

- (a) For the purpose of this title, “local detention facility” means any city, county, city and county, or regional facility used for the confinement for more than 24 hours of adults, or of both adults and minors, but does not include that portion of a facility for the confinement of both adults and minors which is devoted only to the confinement of minors.
- (b) In addition to those provided for in subdivision (a), for the purposes of this title, “local detention facility” also includes any city, county, city and county, or regional facility, constructed on or after January 1, 1978, used for the confinement, regardless of the length of confinement, of adults or of both adults and minors, but does not include that portion of a facility for the confinement of both adults and minors which is devoted only to the confinement of minors.
- (c) “Local detention facility” also includes any adult detention facility, exclusive of any facility operated by the California Department of Corrections or any facility holding inmates pursuant to Section 2910.5, Chapter 4 (commencing with Section 3410) of Title 2 of, Chapter 9.2 (commencing with Section 6220) of Title 7 of Chapter 9.5 (commencing with Section 6250) of Title 7 of, or Chapter 9.6 (commencing with Section 6260) of Title 7 of, Part 3, that holds local prisoners under contract on behalf of cities, counties, or cities and counties. Nothing in this subdivision shall be construed as affecting or authorizing the establishment of private detention facilities.
- (d) For purposes of this title, a local detention facility does not include those rooms that are used for holding persons for interviews, interrogations, or investigations, and are either separate from a jail or located in the administrative area of a law enforcement facility.

Statutory Definition of Willfully

Penal Code section 7(1) defines willful[ly]:

The word “willfully,” when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

Our definition of willfully tracks the statutory language, but renders it in plainer language.

Mental State for Assault

People v. Williams (2001) 26 Cal.4th 779, 790, has the most recent pronouncement on the mental state for assault:

[W]e hold that assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.

872. Assault on School District Peace Officer

1 **The defendant is charged [in Count ____] with assault on a school district peace**
2 **officer.**

3
4 **To prove that the defendant is guilty of this crime, the People must prove**
5 **that:**

- 6
7 **1. The defendant willfully did an act that would directly, naturally,**
8 **and probably result in the application of force to a person.**
9
10 **2. A reasonable person, knowing the same facts that the defendant**
11 **knew, would realize that the defendant's act would directly,**
12 **naturally, and probably have that result.**
13
14 **3. When the defendant acted, (he/she) had the present ability to apply**
15 **force to a person.**
16
17 **4. When the defendant acted, the person assaulted was lawfully**
18 **performing (his/her) duties as a school district peace officer.**
19

20 **[AND]**

- 21
22 **5. When the defendant acted, (he/she) knew, or reasonably should**
23 **have known, both that the person assaulted was a school district**
24 **peace officer and that (he/she) was performing (his/her) duties as a**
25 **school district peace officer.**
26

27 **[AND]**

- 28
29 **6. The defendant did not act (in self-defense/ [or] in defense of**
30 **someone else).]**
31

32 **The terms *application of force* and *apply force* mean to touch in a harmful or**
33 **offensive manner. The slightest touching can be enough if it is done in a rude**
34 **or angry way. It is enough if the touching makes contact with the person,**
35 **including through his or her clothing. The touching need not cause pain or**
36 **injury of any kind.**

37
38 **[The touching can be done indirectly by causing an object [or someone else]**
39 **to touch the other person.]**

The defendant need not have actually intended to use force against a school district peace officer when (he/she) acted. [Voluntary intoxication is not a defense to assault.]

No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

A *school district peace officer* is a peace officer who is a member of a police department of a school district under Education Code section 38000.

[A school district peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force when (making/attempting to make) an otherwise lawful arrest or detention).] *<Give one or more of the following paragraphs defining lawfulness of officer's conduct if these instructions are not already given to the jury in the instructions for a greater offense. If the instructions have already been given, use the first bracketed paragraph below.>*

<Instruction Already Given>

[Instruction _____*<insert instruction number>* explains when an officer is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force when (making/attempting to make) an otherwise lawful arrest or detention).]

<A. Unlawful Detention>

[A peace officer may legally detain someone if:

- 1. He or she knows specific facts that lead him or her to suspect that the person to be detained has been, is, or is about to be involved in activity relating to crime.**

AND

- 2. A reasonable officer who knew the same facts would have the same suspicion.**

Any other detention is unlawful.

81
82 **In deciding whether the detention was unlawful, consider evidence of the**
83 **officer's training and experience and all the circumstances known by the**
84 **officer when he or she detained the person.]**

85
86 *<B. Unlawful Arrest>*

87 **[A peace officer may legally arrest someone [either] (on the basis of an arrest**
88 **warrant/ [or] if he or she has probable cause to make the arrest).**

89
90 **Any other arrest is unlawful.**

91
92 **An officer has *probable cause* to arrest when he or she knows facts that would**
93 **lead a person of ordinary care and prudence to honestly and strongly suspect**
94 **that the person to be arrested is guilty of a crime.**

95
96 **[In order for an officer to lawfully arrest someone without a warrant for a**
97 **misdemeanor or infraction, the officer must have probable cause to believe**
98 **that the person to be arrested committed a misdemeanor or infraction in the**
99 **officer's presence.]**

100
101 **[[On the other hand,] (In/in) order for an officer to lawfully arrest someone**
102 **for a (felony/ [or] _____ *<insert misdemeanor not requiring commission in***
103 ***officer's presence; see Bench Notes>*) without a warrant, that officer must have**
104 **probable cause to believe the person to be arrested committed a (felony/ [or]**
105 **_____ *<insert misdemeanor not requiring commission in officer's presence;***
106 ***see Bench Notes>*). However, it is not required that the offense be committed**
107 **in the officer's presence.]**

108
109 _____ *<insert crime that was basis for arrest>* **is a**
110 **(felony/misdemeanor/infraction).**

111
112 **[The officer must tell that person that the officer intends to arrest him or her,**
113 **why the arrest is being made, and the authority for the arrest.] [The officer**
114 **does not have to tell the arrested person these things if the officer has**
115 **probable cause to believe that the person is committing or attempting to**
116 **commit a crime, is fleeing after having committed a crime, or has escaped**
117 **from custody.] [The officer must also tell the arrested person the offense for**
118 **which (he/she) is being arrested if (he/she) asks for that information.]]**

119
120 *<C. Use of Force>*

121 **[Special rules control the use of force.**

123 A peace officer may use reasonable force to arrest or detain someone, to
124 prevent escape, to overcome resistance, or in self-defense.

125
126 If a person knows, or reasonably should know, that a peace officer is
127 arresting or detaining him or her, the person must not use force or any
128 weapon to resist an officer's use of reasonable force.

129
130 If a peace officer uses unreasonable or excessive force while
131 (arresting/attempting to arrest/detaining/attempting to detain) a person, that
132 person may lawfully use reasonable force to defend (himself/herself).

133
134 A person being arrested uses reasonable force when he or she uses that
135 degree of force that he or she actually believes is reasonably necessary to
136 protect himself or herself from the officer's use of unreasonable or excessive
137 force. The force must be no more than a reasonable person in the same
138 situation would believe is necessary for his or her protection.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

The court also has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168.) On request, the court must instruct that the People have the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145.) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47.)

Give bracketed element 6 if the evidence raises an issue of defense of self or others.

Give the appropriate bracketed paragraphs on the lawfulness of the officer's conduct and use of force if those instructions have not already been given in the instructions for a greater offense. If the instructions have been given, use the bracketed paragraph directing the jury to that other instruction.

In the paragraphs headed “A. Unlawful Detention,” if the case presents a factual issue of whether the defendant was in fact detained, the court should provide the jury with a definition of when a person is legally detained.

In the paragraphs headed “B. Unlawful Arrest,” several options are given depending on the crime for which the arrest was made. The general rule is that an officer may not make an arrest for a misdemeanor or infraction unless the offense was committed in the officer’s presence. (See Pen. Code, § 836(a)(1).) Statutes provide exceptions to this requirement for some misdemeanors. (See, e.g., Pen. Code, § 836(c) [violation of domestic violence protective or restraining order]; Veh. Code, § 40300.5 [driving under the influence plus traffic accident or other specified circumstance].) If the defense does not rely on the statutory limitation, neither bracketed paragraph regarding arrest without a warrant need be given. If the only offense on which the officer relied in making the arrest is a nonexempted misdemeanor or an infraction, give the first bracketed paragraph beginning “In order for an officer to lawfully arrest someone without a warrant . . .” If the officer allegedly made the arrest for both a misdemeanor or infraction *and* a felony or exempted misdemeanor, give both bracketed paragraphs.

In cases involving multiple crimes, use the paragraph that specifies the crime that was the basis for the arrest as many times as needed to describe each underlying crime separately.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of “attempted assault” in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522.)

AUTHORITY

Elements ▶ Pen. Code, §§ 240, 241.4; Educ. Code, § 38000.

Willful Defined ▶ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790.

Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335, citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 67, pp. 685– 686.

COMMENTARY

Penal Code section 241.4 refers to former Education Code section 39670, which was repealed and substantially reenacted as Education Code section 38000,

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effective January 1, 1998. (For previous version, see Stats. 1996, ch. 277, §§ 5, 6.) A school district peace officer is anyone so designated by the superintendent of the school district, but is not vested with general police powers. (See Educ. Code, § 38000(a).) The scope of authority for school district peace officers is set forth in Penal Code section 830.32. (See Educ. Code, § 38001.)

STAFF NOTES

An assault is an attempted battery and a lesser included offense of battery. Accordingly, this instruction is modeled after the battery instruction in light of the Supreme Court's decision in *People v. Williams*, as well as the excerpts of authority given below.

Violent Injury

"[T]he term "violent injury" used in defining an assault is not synonymous with term "bodily harm," but includes "any wrongful act committed by means of physical force against the person of another." (*People v. Herrera* (1970) 6 Cal.App.3d 846, 851.)

Statutory Definition of Assault

Penal Code section 240 defines assault:

An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.

Statutory Definition of Assault on a Peace Officer of a School District

Penal Code section 241.4 defines assault on a peace officer of a school district:

An assault is punishable by fine not exceeding one thousand dollars (\$1,000), or by imprisonment in the county jail not exceeding six months, or by both. When the assault is committed against the person of a peace officer engaged in the performance of his or her duties as a member of a police department of a school district pursuant to Section 39670 of the Education Code, and the person committing the offense knows or reasonably should know that the victim is a peace officer engaged in the performance of his or her duties, the offense shall be punished by imprisonment in the county jail not exceeding one year or by imprisonment in the state prison.

Section 241.4 refers to former Education Code section 39670, which was repealed effective January 1, 1998. The section was substantially reenacted in Education Code section 38000, which provides (Stats. 1996, ch. 277, §§ 5, 6):

(a) The governing board of any school district may establish a security department under the supervision of a chief of security or a police department under the supervision of a chief of police, as designated by, and under the direction of, the superintendent of the school district. In accordance with Chapter 5 (commencing with Section 45100) of Part 25, the governing board may employ personnel to ensure the safety of school district personnel and pupils and the security of the real and personal property of the school district. In addition, a school district may assign a school police reserve officer who is deputized pursuant to Section 35021.5 to a schoolsite to supplement the duties of school police personnel pursuant to this section. It is the intention of the Legislature in enacting this section that a school district police or security department is supplementary to city and county law enforcement agencies and is not vested with general police powers.

(b) The governing board of a school district that establishes a security department or a police department shall set minimum qualifications of employment for the chief of security or chief of police, respectively, including, but not limited to, prior employment as a peace officer or completion of any peace officer training course approved by the Commission on Peace Officer Standards and Training. A chief of security or chief of police shall comply with the prior employment or training requirement set forth in this subdivision as of January 1, 1993, or a date one year subsequent to the initial employment of the chief of security or chief of police by the school district, whichever occurs later. This subdivision shall not be construed to require the employment by a school district of any additional personnel.

The general scope of authority for school district peace officers is set forth in Penal Code section 830.32, as stated in Education Code section 38001:

Persons employed and compensated as members of a police department of a school district, when appointed and duly sworn, are peace officers, for the purposes of carrying out their duties of employment pursuant to 830.32 of the Penal Code.

Statutory Definition of Willfully

Penal Code section 7(1) defines willful[ly]:

The word “willfully,” when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

Our definition of willfully tracks the statutory language, but renders it in plainer language.

Mental State for Assault

People v. Williams (2001) 26 Cal.4th 779, 790, has the most recent pronouncement on the mental state for assault:

[W]e hold that assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.

873. Assault on School Employee

1 **The defendant is charged [in Count __] with assault on a school employee.**

2
3 **To prove that the defendant is guilty of this crime, the People must prove**
4 **that:**

- 5
- 6 **1. The defendant willfully did an act that would directly, naturally,**
7 **and probably result in the application of force to a person.**
8
 - 9 **2. A reasonable person, knowing the same facts that the defendant**
10 **knew, would realize that the defendant's act would directly,**
11 **naturally, and probably have that result.**
12
 - 13 **3. When the defendant acted, (he/she) had the present ability to apply**
14 **force to a person.**
15
 - 16 **4. When the defendant acted, (he/she) knew, or reasonably should**
17 **have known, that the person assaulted was a school employee [and**
18 **that (he/she) was performing (his/her) duties as a school employee].**
19

20 **[AND]**

- 21
- 22 **5. (When the defendant acted, the person assaulted was performing**
23 **(his/her) duties[,]/ [or] (The/the) defendant acted in retaliation for**
24 **something the school employee had done in the course of (his/her)**
25 **duties).**
26

27 **[AND]**

- 28
- 29 **6. The defendant did not act (in self-defense/ [or] in defense of**
30 **someone else).]**
31

32 **The terms *application of force* and *apply force* mean to touch in a harmful or**
33 **offensive manner. The slightest touching can be enough if it is done in a rude**
34 **or angry way. It is enough if the touching makes contact with the person,**
35 **including through his or her clothing. The touching need not cause pain or**
36 **injury of any kind.**

37
38 **[The touching can be done indirectly by causing an object [or someone else]**
39 **to touch the other person.]**

40
41 **The defendant need not have actually intended to use force against a school**
42 **employee when (he/she) acted. [Voluntary intoxication is not a defense to**
43 **assault.]**
44

45 **No one needs to actually have been injured by defendant’s act. But if someone**
46 **was injured, you may consider that fact, along with all the other evidence, in**
47 **deciding whether the defendant committed an assault[, and if so, what kind of**
48 **assault it was].**
49

50 **Someone commits an act *willfully* when he or she does it willingly or on**
51 **purpose. It is not required that he or she intend to break the law, hurt**
52 **someone else, or gain any advantage.**
53

54 **A *school employee* is any person employed as a permanent or probationary**
55 **certificated or classified employee of a school district on a part-time or full-**
56 **time basis, including a substitute teacher, student teacher, or school board**
57 **member.**
58

59 **[It is not a defense that an assault took place off campus or outside of school**
60 **hours.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If the sole motivation alleged for the assault is retaliation, do not give the bracketed clause in element 4 and give only the second option in element 5.

Give bracketed element 6 if the evidence raises an issue of defense of self or others.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of “attempted assault” in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522.)

AUTHORITY

Elements ► Pen. Code, §§ 240, 241.6.

Willful Defined ▶ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790.

Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335, citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 20, 73, pp. 650–651, 690.

STAFF NOTES

An assault is an attempted battery and a lesser included offense of battery. Accordingly, this instruction is modeled after the battery instruction in light of the Supreme Court's decision in *People v. Williams*, as well as the excerpts of authority given below.

Violent Injury

"[T]he term "violent injury" used in defining an assault is not synonymous with term "bodily harm," but includes "any wrongful act committed by means of physical force against the person of another." (*People v. Herrera* (1970) 6 Cal.App.3d 846, 851.)

Statutory Definition of Assault

Penal Code section 240 defines assault:

An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.

Statutory Definition of Assault on a School Employee

Penal Code section 241.6 defines assault on a school employee:

When an assault is committed against a school employee engaged in the performance of his or her duties, or in retaliation for an act performed in the course of his or her duties, whether on or off campus, during the schoolday or at any other time, and the person committing the offense knows or reasonably should know the victim is a school employee, the assault is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding two thousand dollars (\$2,000), or by both the fine and imprisonment.

For purposes of this section, "school employee" has the same meaning as defined in subdivision (d) of Section 245.5.

This section shall not apply to conduct arising during the course of an otherwise lawful labor dispute.

Statutory Definition of School Employee

Penal Code section 245.5(d) defines school employee:

As used in this section, "school employee" means any person employed as a permanent or probationary certificated or

classified employee of a school district on a part-time or full-time basis, including a substitute teacher. “School employee,” as used in this section, also includes a student teacher, or a school board member.

Statutory Definition of Willfully

Penal Code section 7(1) defines willful[ly]:

The word “willfully,” when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

Our definition of willfully tracks the statutory language, but renders it in plainer language.

Mental State for Assault

People v. Williams (2001) 26 Cal.4th 779, 790, has the most recent pronouncement on the mental state for assault:

[W]e hold that assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.

874. Assault on Juror

1 **The defendant is charged [in Count ____] with assault on a juror.**

2
3 **To prove that the defendant is guilty of this crime, the People must prove**
4 **that:**

- 5
- 6 **1. The defendant (was/had been) a party to a case for which a jury**
7 **had been selected.**
 - 8
 - 9 **2. The defendant willfully did an act that would directly, naturally,**
10 **and probably result in the application of force to someone who had**
11 **been sworn as a juror [or alternate juror] to decide that case.**
 - 12
 - 13 **3. A reasonable person, knowing the same facts that the defendant**
14 **knew, would realize that the defendant's act would directly,**
15 **naturally, and probably have that result.**
 - 16

17 **[AND]**

- 18
- 19 **4. When the defendant acted, (he/she) had the present ability to apply**
20 **force to a person.**
 - 21

22 **[AND]**

- 23
- 24 **5. The defendant did not act (in self-defense/ [or] in defense of**
25 **someone else).]**
 - 26

27 **The terms *application of force* and *apply force* mean to touch in a harmful or**
28 **offensive manner. The slightest touching can be enough if it is done in a rude**
29 **or angry way. It is enough if the touching makes contact with the person,**
30 **including through his or her clothing. The touching need not cause pain or**
31 **injury of any kind.**

32

33 **[The touching can be done indirectly by causing an object [or someone else]**
34 **to touch the other person.]**

35

36 **The defendant need not have actually intended to use force against a juror**
37 **when (he/she) acted. [Voluntary intoxication is not a defense to assault.]**
38

39 No one needs to actually have been injured by defendant's act. But if someone
40 was injured, you may consider that fact, along with all the other evidence, in
41 deciding whether the defendant committed an assault[, and if so, what kind of
42 assault it was].

43
44 Someone commits an act *willfully* when he or she does it willingly or on
45 purpose. It is not required that he or she intend to break the law, hurt
46 someone else, or gain any advantage.

47
48 [It is not a defense that an assault was committed after the trial was
49 completed.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give bracketed element 5 if the evidence raises an issue of defense of self or others.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522.)

AUTHORITY

Elements ▶ Pen. Code, §§ 240, 241.7.

Willful Defined ▶ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790.

Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335, citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 71, p. 689.

STAFF NOTES

An assault is an attempted battery and a lesser included offense of battery. Accordingly, this instruction is modeled after the battery instruction in light of the Supreme Court's decision in *People v. Williams*, as well as the excerpts of authority given below.

Violent Injury

"[T]he term "violent injury" used in defining an assault is not synonymous with term "bodily harm," but includes "any wrongful act committed by means of physical force against the person of another." (*People v. Herrera* (1970) 6 Cal.App.3d 846, 851.)

Statutory Definition of Assault

Penal Code section 240 defines assault:

An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.

Statutory Definition of Assault on a Juror

Penal Code section 241.7 defines assault on a juror:

Any person who is a party to a civil or criminal action in which a jury has been selected to try the case and who, while the legal action is pending or after the conclusion of the trial, commits an assault against any juror or alternate juror who was selected and sworn in that legal action, shall be punished by a fine not to exceed two thousand dollars (\$2,000), or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment, or by imprisonment in the state prison.

Statutory Definition of Willfully

Penal Code section 7(1) defines willful[ly]:

The word "willfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

Our definition of willfully tracks the statutory language, but renders it in plainer language.

Mental State for Assault

People v. Williams (2001) 26 Cal.4th 779, 790, has the most recent pronouncement on the mental state for assault:

[W]e hold that assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.

875. Assault With Deadly Weapon or Force Likely
to Produce Great Bodily Injury

1 **The defendant is charged [in Count __] with assault with (force likely to**
2 **produce great bodily injury/a deadly weapon other than a firearm/a**
3 **firearm/a semiautomatic firearm/a machine gun/an assault weapon).**

4
5 **To prove that the defendant is guilty of this crime, the People must prove**
6 **that:**

7
8 *<Alternative 1A—force with weapon>*

9 **[1. The defendant willfully did an act with (a deadly weapon other than**
10 **a firearm/a firearm/a semiautomatic firearm/a machine gun/an**
11 **assault weapon) that would directly, naturally, and probably result**
12 **in the application of force to a person.]**

13
14 *<Alternative 1B—force without weapon>*

15 **[1. The defendant willfully did an act that would directly, naturally,**
16 **and probably result in the application of force to a person, and the**
17 **force used was likely to produce great bodily injury.]**

18
19 **2. A reasonable person, knowing the same facts that the defendant**
20 **knew, would realize that the defendant’s act would directly,**
21 **naturally, and probably have that result.**

22
23 **[AND]**

24
25 **3. When the defendant acted, (he/she) had the present ability to apply**
26 **force (likely to produce great bodily injury/with a deadly weapon**
27 **other than a firearm/with a firearm/with a semiautomatic**
28 **firearm/with a machine gun/with an assault weapon) to a person.**

29
30 **[AND]**

31
32 **4. The defendant did not act (in self-defense/ [or] in defense of**
33 **someone else).]**

34
35 **The terms *application of force* and *apply force* mean to touch in a harmful or**
36 **offensive manner. The slightest touching can be enough if it is done in a rude**
37 **or angry way. It is enough if the touching makes contact with the person,**

38 including through his or her clothing. The touching need not cause pain or
39 injury of any kind.

40
41 [The touching can be done indirectly by causing an object [or someone else]
42 to touch the other person.]

43
44 The defendant need not have actually intended to use force against someone
45 when (he/she) acted. [Voluntary intoxication is not a defense to assault.]

46
47 No one needs to actually have been injured by defendant's act. But if someone
48 was injured, you may consider that fact, along with all the other evidence, in
49 deciding whether the defendant committed an assault[, and if so, what kind of
50 assault it was].

51
52 Someone commits an act *willfully* when he or she does it willingly or on
53 purpose. It is not required that he or she intend to break the law, hurt
54 someone else, or gain any advantage.

55
56 [*Great bodily injury* means significant or substantial physical injury.]

57
58 [A *deadly weapon* is any object, instrument, or weapon that is used in a way
59 capable of causing and likely to cause death or great bodily injury.]

60
61 [A *firearm* is any device designed to be used as a weapon, from which a
62 projectile is expelled through a barrel by the force of an explosion or other
63 form of combustion.]

64
65 [A *machine gun* is any weapon that (shoots/is designed to shoot/ [or]
66 can readily be restored to shoot) automatically more than one shot by a
67 single function of the trigger and without manual reloading.]

68
69 [An *assault weapon* includes _____ <insert names of appropriate
70 designated assault weapons listed in Pen. Code, §§ 12276 and 12276.1>.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give element 1A if it is alleged the assault was committed with a deadly weapon, firearm, semiautomatic firearm, machine gun, or an assault weapon. Give 1B if it

is alleged that the assault was committed with force likely to produce great bodily injury. (See Pen. Code, § 245(a).)

Give bracketed element 4 if the evidence raises an issue of defense of self or others.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of “attempted assault” in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522.)

AUTHORITY

Elements ▶ Pen. Code, §§ 240, 245(a)(1)–(3) & (b).

Assault Weapon Defined ▶ Pen. Code, §§ 12276, 12276.1.

Firearm Defined ▶ Pen. Code, § 12001(b).

Machine Gun Defined ▶ Pen. Code, § 12200.

Willful Defined ▶ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

Deadly Weapon Defined ▶ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029.

Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790.

Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335, citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 40–47, pp. 663–672.

LESSER INCLUDED OFFENSES

Assault ▶ Pen. Code, § 240.

A misdemeanor brandishing of a weapon or firearm under Penal Code section 417 is not a lesser and necessarily included offense of assault with a deadly weapon. (*People v. Escarcega* (1974) 43 Cal.App.3d 391, 398; *People v. Steele* (2000) 83 Cal.App.4th 212, 218, 221.)

RELATED ISSUES

Semiautomatic Firearm Need Not be Operable

Assault with a semiautomatic weapon does not require proof that the gun was operable as a semiautomatic at the time of the assault. A person may commit an assault under Penal Code section 245(b) by using the gun as a club or bludgeon,

regardless of whether he or she could also have fired it in a semiautomatic manner at that moment. (*People v. Miceli* (2002) 104 Cal.App.4th 256.)

STAFF NOTES

Penal Code section 245(a)(1) defines assault with a deadly weapon or force likely to produce great bodily injury as:

Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment.

Penal Code section 245(a)(2) and (3) define assault with a firearm or machine gun (the committee favors “machine gun” as two words):

(2) Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars (\$10,000) and imprisonment.

(3) Any person who commits an assault upon the person of another with a machinegun, as defined in Section 12200, or an assault weapon, as defined in Section 12276 or 12276.1, shall be punished by imprisonment in the state prison for 4, 8, or 12 years.

Penal Code section 245(b) defines assault with a semiautomatic weapon:

Any person who commits an assault upon the person of another with a semiautomatic firearm shall be punished by imprisonment in the state prison for three, six, or nine years.

Penal Code section 12001(b) defines firearm:

As used in this title, “firearm” means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion.

Deadly weapon is defined in *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029:

As used in section 245, subdivision (a)(1), a “deadly weapon” is “any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury. (citations omitted)

See *People v. Beasley* (2003, B160513) __ Cal.App.4th __ [insufficient evidence that broomstick and plastic vacuum attachment were deadly weapons capable of producing great bodily injury].

Aguilar holds that weapons must be objects extrinsic to the human body:

[W]e conclude a “deadly weapon” within the meaning of section 245 must be an object extrinsic to the human body. Bare hands or feet, therefore, cannot be deadly weapons; to the extent the prosecutor’s argument suggested the contrary, it was erroneous.

A machine gun is defined in Section 12200 of the Penal Code as:

The term “machinegun” as used in this chapter means any weapon which shoots, is designed to shoot, or can readily be restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person. The term also includes any weapon deemed by the federal Bureau of Alcohol, Tobacco, and Firearms as readily convertible to a machinegun under Chapter 53 (commencing with Section 5801) of Title 26 of the United States Code.

“Great bodily injury is significant or substantial injury.” (*People v. Beasley* (2003, B160513) __ Cal.App.4th __; *People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1066; see Pen. Code, § 12022.7(f).)

“Permanent or protracted impairment, disfigurement, or loss of function, however, is not required.” (*Beasley, supra.*)

876. Assault on Firefighter or Peace Officer With Deadly Weapon
or Force Likely to Produce Great Bodily Injury

1 **The defendant is charged [in Count __] with assault with (force likely to**
2 **produce great bodily injury/a deadly weapon other than a firearm/a**
3 **firearm/a semiautomatic firearm/a machine gun/an assault weapon) on a**
4 **(firefighter/peace officer).**

5
6 **To prove that the defendant is guilty of this crime, the People must prove**
7 **that:**

8
9 *<Alternative 1A—force with weapon>*

10 **[1. The defendant willfully did an act with (a deadly weapon other than**
11 **a firearm/a firearm/a semiautomatic firearm/a machine gun/an**
12 **assault weapon) that would directly, naturally, and probably result**
13 **in the application of force to a person.]**

14
15 *<Alternative 1B—force without weapon>*

16 **[1. The defendant willfully did an act that would directly, naturally,**
17 **and probably result in the application of force to a person, and the**
18 **force used was likely to produce great bodily injury.]**

19
20 **2. A reasonable person, knowing the same facts that the defendant**
21 **knew, would realize that the defendant’s act would directly,**
22 **naturally, and probably have that result.**

23
24 **3. When the defendant acted, (he/she) had the present ability to apply**
25 **force (likely to produce great bodily injury/with a deadly weapon**
26 **other than a firearm/with a firearm/with a semiautomatic**
27 **firearm/with a machine gun/with an assault weapon) to a person.**

28
29 **4. When the defendant acted, the person assaulted was lawfully**
30 **performing (his/her) duties as a (firefighter/peace officer).**

31
32 **[AND]**

33
34 **5. When the defendant acted, (he/she) knew, or reasonably should**
35 **have known, that the person assaulted was a (firefighter/peace**
36 **officer) who was performing (his/her) duties.**

37
38 **[AND]**

39 **6. The defendant did not act (in self-defense/ [or] in defense of**
40 **someone else).]**

41
42 **The terms *application of force* and *apply force* mean to touch in a harmful or**
43 **offensive manner. The slightest touching can be enough if it is done in a rude**
44 **or angry way. It is enough if the touching makes contact with the person,**
45 **including through his or her clothing. The touching need not cause pain or**
46 **injury of any kind.**

47
48 **[The touching can be done indirectly by causing an object [or someone else]**
49 **to touch the other person.]**

50
51 **The defendant need not have actually intended to use force against a**
52 **(firefighter/peace officer) when (he/she) acted. [Voluntary intoxication is not a**
53 **defense to assault.]**

54
55 **No one needs to actually have been injured by defendant's act. But if someone**
56 **was injured, you may consider that fact, along with all the other evidence, in**
57 **deciding whether the defendant committed an assault[, and if so, what kind of**
58 **assault it was].**

59
60 **Someone commits an act *willfully* when he or she does it willingly or on**
61 **purpose. It is not required that he or she intend to break the law, hurt**
62 **someone else, or gain any advantage.**

63
64 **[*Great bodily injury* means significant or substantial physical injury.]**

65
66 **[A *deadly weapon* is any object, instrument, or weapon that is used in a way**
67 **capable of causing and likely to cause death or great bodily injury.]**

68
69 **[A *firearm* is any device designed to be used as a weapon, from which a**
70 **projectile is expelled through a barrel by the force of any explosion or other**
71 **form of combustion.]**

72
73 **[A *machine gun* is any weapon that (shoots/is designed to shoot/ [or]**
74 **can readily be restored to shoot) automatically more than one shot by a**
75 **single function of the trigger and without manual reloading.]**

76
77 **[An *assault weapon* includes _____ <insert names of appropriate**
78 **designated assault weapons listed in Pen. Code, §§ 12276 and 12276.1>.]**

79
80 **[A sworn member of _____ <insert name of agency that employs peace**
81 **officer >, authorized by _____ <insert appropriate section from Pen.**

Code, § 830 et seq.> to _____ <describe statutory authority>, is a **peace officer.**]

[The duties of a _____ <insert title of peace officer specified in Pen. Code, § 830 et seq.> include _____ <insert job duties>.]

[A **firefighter** includes anyone who is an officer, employee, or member of a (governmentally operated (fire department/fire protection or firefighting agency) in this state/federal fire department/federal fire protection or firefighting agency), whether or not he or she is paid for his or her services.]

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force when (making/attempting to make) an otherwise lawful arrest or detention).] <Give one or more of the following bracketed paragraphs defining lawfulness of officer's conduct if these instructions are not already given to the jury in the instructions for a greater offense. If the instructions have already been given, use the first bracketed paragraph below.>

<Instruction Already Given>

[Instruction _____<insert instruction number> explains when an officer is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force when (making/attempting to make) an otherwise lawful arrest or detention).]

<A. Unlawful Detention>

[A peace officer may legally detain someone if:

1. He or she knows specific facts that lead him or her to suspect that the person to be detained has been, is, or is about to be involved in activity relating to crime.

AND

2. A reasonable officer who knew the same facts would have the same suspicion.

Any other detention is unlawful.

In deciding whether the detention was unlawful, consider evidence of the officer's training and experience and all the circumstances known by the officer when he or she detained the person.]

125 <B. Unlawful Arrest>

126 [A peace officer may legally arrest someone [either] (on the basis of an arrest
127 warrant/ [or] if he or she has probable cause to make the arrest).

128
129 Any other arrest is unlawful.

130
131 An officer has *probable cause* to arrest when he or she knows facts that would
132 lead a person of ordinary care and prudence to honestly and strongly suspect
133 that the person to be arrested is guilty of a crime.

134
135 [In order for an officer to lawfully arrest someone without a warrant for a
136 misdemeanor or infraction, the officer must have probable cause to believe
137 that the person to be arrested committed a misdemeanor or infraction in the
138 officer's presence.]

139
140 [[On the other hand,] (In/in) order for an officer to lawfully arrest someone
141 for a (felony/ [or] _____ <insert misdemeanor not requiring commission in
142 officer's presence; see Bench Notes>) without a warrant, that officer must have
143 probable cause to believe the person to be arrested committed a (felony/ [or]
144 _____ <insert misdemeanor not requiring commission in officer's presence;
145 see Bench Notes>). However, it is not required that the offense be committed
146 in the officer's presence.]

147
148 _____ <insert crime that was basis for arrest> is a
149 (felony/misdemeanor/infraction).

150
151 [In order for an officer to enter a home without a warrant to arrest someone:

- 152
153 1. The officer must have probable cause to believe that the person to be
154 arrested committed a crime.

155
156 AND

- 157
158 2. Exigent circumstances require the officer to enter the home without a
159 warrant.

160
161 The term *exigent circumstances* describes an emergency situation that
162 requires swift action to prevent (1) imminent danger to life or serious damage
163 to property, or (2) the imminent escape of a suspect or destruction of
164 evidence.]

165
166 [The officer must tell that person that the officer intends to arrest him or her,
167 why the arrest is being made, and the authority for the arrest.] [The officer

168 does not have to tell the arrested person these things if the officer has
169 probable cause to believe that the person is committing or attempting to
170 commit a crime, is fleeing after having committed a crime, or has escaped
171 from custody.][The officer must also tell the arrested person the offense for
172 which (he/she) is being arrested if (he/she) asks for that information.]]

173
174 <C. Use of Force>

175 [Special rules control the use of force.

176
177 A peace officer may use reasonable force to arrest or detain someone, to
178 prevent escape, to overcome resistance, or in self-defense.

179
180 If a person knows, or reasonably should know, that a peace officer is
181 arresting or detaining him or her, the person must not use force or any
182 weapon to resist an officer's use of reasonable force.

183
184 If a peace officer uses unreasonable or excessive force while
185 (arresting/attempting to arrest/detaining/attempting to detain) a person, that
186 person may lawfully use reasonable force to defend (himself/herself).

187
188 A person being arrested uses reasonable force when he or she uses that
189 degree of force that he or she actually believes is reasonably necessary to
190 protect himself or herself from the officer's use of unreasonable or excessive
191 force. The force must be no more than a reasonable person in the same
192 situation would believe is necessary for his or her protection.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

The court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168.) On request, the court must instruct that the People have the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145.) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47.)

Give element 1A if it is alleged the assault was committed with a deadly weapon, a firearm, a semiautomatic firearm, a machine gun, or an assault weapon. Give element 1B if it is alleged that the assault was committed with force likely to produce great bodily injury. (See Pen. Code, § 245(c) & (d).)

Give bracketed element 6 if the evidence raises an issue of defense of self or others.

Give the appropriate bracketed paragraphs on the lawfulness of the officer's conduct and use of force if those instructions have not already been given in the instructions for a greater offense. If the instructions have been given, use the bracketed paragraph directing the jury to that other instruction.

In the paragraphs headed "A. Unlawful Detention," if the case presents a factual issue of whether the defendant was in fact detained, the court should provide the jury with a definition of when a person is legally detained.

In the paragraphs headed "B. Unlawful Arrest," several options are given depending on the crime for which the arrest was made. The general rule is that an officer may not make an arrest for a misdemeanor or infraction unless the offense was committed in the officer's presence. (See Pen. Code, § 836(a)(1).) Statutes provide exceptions to this requirement for some misdemeanors. (See, e.g., Pen. Code, § 836(c) [violation of domestic violence protective or restraining order]; Veh. Code, § 40300.5 [driving under the influence plus traffic accident or other specified circumstance].) If the defense does not rely on the statutory limitation, neither bracketed paragraph regarding arrest without a warrant need be given. If the only offense on which the officer relied in making the arrest is a nonexempted misdemeanor or an infraction, give the first bracketed paragraph beginning "In order for an officer to lawfully arrest someone without a warrant" If the officer allegedly made the arrest for both a misdemeanor or infraction *and* a felony or exempted misdemeanor, give both bracketed paragraphs.

In cases involving multiple crimes, use the paragraph that specifies the crime that was the basis for the arrest as many times as needed to describe each underlying crime separately.

Give the bracketed language about entering a home under exigent circumstances if the arrest took place in the defendant's home. (*People v. Wilkins* (1993) 14 Cal.App.4th 761, 777.)

The jury must determine whether the victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445.) The court may instruct the jury on the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove

Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers”). (*Ibid.*) However, the court may not instruct the jury that the victim was a peace officer as a matter of law (e.g., “Officer Reed was a peace officer”). (*Ibid.*)

Do not give an attempt instruction in conjunction with this instruction. There is no crime of “attempted assault” in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522.)

AUTHORITY

Elements ▶ Pen. Code, §§ 240, 245(c) & (d)(1)–(3).

Assault Weapon Defined ▶ Pen. Code, §§ 12276, 12276.1.

Firearm Defined ▶ Pen. Code, § 12001(b).

Firefighter Defined ▶ Pen. Code, § 245.1.

Machine Gun Defined ▶ Pen. Code, § 12200.

Peace Officer Defined ▶ Pen. Code, § 830 et seq.

Willful Defined ▶ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

Deadly Weapon Defined ▶ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029.

Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790.

Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335, citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 65, pp. 683–684.

LESSER INCLUDED OFFENSES

Assault ▶ Pen. Code, § 240.

Assault With a Deadly Weapon ▶ Pen. Code, § 245.

RELATED ISSUES

Transferred Intent

The doctrine of transferred intent does not apply to general intent crimes such as assault. (*People v. Lee* (1994) 28 Cal.App.4th 1724, 1737.)

STAFF NOTES

Penal Code section 245(c) defines assault with a deadly weapon or force likely to produce great bodily injury on a peace officer or firefighter:

(c) Any person who commits an assault with a deadly weapon or instrument, other than a firearm, or by any means likely to produce great bodily injury upon the person of a peace officer or firefighter, and who knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties, when the peace officer or firefighter is engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for three, four, or five years.

Penal Code section 245(d)(1)–(3) defines assault with a firearm, semiautomatic firearm, machinegun, or assault weapon on a peace officer or firefighter:

(d)(1) Any person who commits an assault with a firearm upon the person of a peace officer or firefighter, and who knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties, when the peace officer or firefighter is engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for four, six, or eight years.

(2) Any person who commits an assault upon the person of a peace officer or firefighter with a semiautomatic firearm and who knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties, when the peace officer or firefighter is engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for five, seven, or nine years.

(3) Any person who commits an assault with a machinegun, as defined in Section 12200, or an assault weapon, as defined in Section 12276 or 12276.1, upon the person of a peace officer or firefighter, and who knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for 6, 9, or 12 years.

Penal Code section 12001(b) defines firearm:

As used in this title, “firearm” means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion.

Deadly weapon is defined in *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029:

As used in section 245, subdivision (a)(1), a “deadly weapon” is “any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury. (citations omitted)

Firefighter is defined in Penal Code Section 245.1 as:

As used in Sections 148.2, 241, 243, 244.5, and 245, “fireman” or “firefighter” includes any person who is an officer, employee or member of a fire department or fire protection or firefighting agency of the federal government, the State of California, a city, county, city and county, district, or other public or municipal corporation or political subdivision of this state, whether this person is a volunteer or partly paid or fully paid.

Peace officer is defined in Penal Code sections 830 et seq. in provisions too lengthy to set forth here.

Penal Code section 12200 defines machine gun as follows:

The term “machinegun” as used in this chapter means any weapon which shoots, is designed to shoot, or can readily be restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person. The term also includes any weapon deemed by the federal Bureau of Alcohol, Tobacco, and Firearms as readily convertible to a machinegun under Chapter 53 (commencing with Section 5801) of Title 26 of the United States Code.

Penal Code sections 12276 and 12276.1 provide lists of the kinds of semiautomatic firearms that are assault weapons.

877. Assault on Custodial Officer With Deadly Weapon or Force Likely
to Produce Great Bodily Injury

**The defendant is charged [in Count __] with assault with (force likely to
produce great bodily injury/a deadly weapon) on a custodial officer.**

**To prove that the defendant is guilty of this crime, the People must prove
that:**

<Alternative 1A—force with weapon>

**[1. The defendant willfully did an act with a deadly weapon that would
directly, naturally, and probably result in the application of force to
a person.]**

<Alternative 1B—force without weapon>

**[1. The defendant willfully did an act that would directly, naturally,
and probably result in the application of force to a person, and the
force used was likely to produce great bodily injury.]**

**2. A reasonable person, knowing the same facts that the defendant
knew, would realize that the defendant’s act would directly,
naturally, and probably have that result.**

**3. When the defendant acted, (he/she) had the present ability to apply
force (likely to produce great bodily injury/with a deadly weapon)
to a person.**

**4. When the defendant acted, the custodial officer was lawfully
performing (his/her) duties.**

[AND]

**5. When the defendant acted, (he/she) knew, or reasonably should
have known, both that the person assaulted was a custodial officer
and that (he/she) was performing (his/her) duties as a custodial
officer.**

[AND]

**6. The defendant did not act (in self-defense/ [or] in defense of
someone else).]**

The terms *application of force* and *apply force* mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. It is enough if the touching makes contact with the person, including through his or her clothing. The touching need not cause pain or injury of any kind.

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

The defendant need not have actually intended to use force against a custodial officer when (he/she) acted. [Voluntary intoxication is not a defense to assault.]

No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[*Great bodily injury* means significant or substantial physical injury.]

[A *deadly weapon* is any object, instrument, or weapon that is used in a way capable of causing and likely to cause death or great bodily injury.]

A *custodial officer* is someone who works for a law enforcement agency of a city or county, is responsible for maintaining custody of prisoners, and helps operate a local detention facility. [A (county jail/city jail/_____ <insert other detention facility>) is a local detention facility.] [A custodial officer is not a peace officer.]

[A custodial officer is not lawfully performing his or her duties if he or she is using unreasonable or excessive force in his or her duties.] <Give the following bracketed paragraphs defining use of force if these instructions are not already given to the jury in the instructions for a greater offense. If the instructions have already been given, use the first bracketed paragraph below.>

<Instruction Already Given>

[Instruction _____ <insert instruction number> explains when a custodial officer is using unreasonable or excessive force in his or her duties.]

82
83 <Use of Force>

84 [Special rules control the use of force.

85
86 A custodial officer may use reasonable force in his or her duties to restrain a
87 person, to overcome resistance, or in self-defense.

88
89 If a person knows, or reasonably should know, that a custodial officer is
90 restraining him or her, the person must not use force or any weapon to resist
91 an officer's use of reasonable force.

92
93 If a custodial officer uses unreasonable or excessive force while restraining a
94 person, that person may lawfully use reasonable force to defend himself or
95 herself.

96
97 A person being restrained uses reasonable force when he or she uses that
98 degree of force that he or she actually believes is reasonably necessary to
99 protect himself or herself from the officer's use of unreasonable or excessive
100 force. The force must be no more than a reasonable person in the same
101 situation would believe is necessary for his or her protection.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

The court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168.) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if he or she used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47.)

Give element 1A if it is alleged the assault was committed with a deadly weapon. Give element 1B if it is alleged that the assault was committed with force likely to produce great bodily injury. (See Pen. Code, § 245.3.)

Give bracketed element 6 if the evidence raises an issue of defense of self or others.

Give the bracketed paragraphs on use of force if those instructions have not already been given in the instructions for a greater offense. If the instructions have been given, use the bracketed paragraph directing the jury to that other instruction.

When appropriate, only describe the type of detention facility in the blank within the paragraph defining “custodial officer” and do not insert the name of a specific detention facility. Otherwise the court could invade the province of the jury to determine that the facility in question is, in fact, a local detention facility. (See *People v. Flood* (1998) 18 Cal.4th 470, 482.) If there is a dispute about whether the site of an alleged crime is a local detention facility, see Penal Code section 6031.4.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of “attempted assault” in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522.)

AUTHORITY

Elements ▶ Pen. Code, §§ 240, 245, 245.3.

Custodial Officer Defined ▶ Pen. Code, § 831.

Local Detention Facility Defined ▶ Pen. Code, § 6031.4.

Willful Defined ▶ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

Deadly Weapon Defined ▶ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029.

Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790.

Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335, citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 67, p. 686.

STAFF NOTES

An assault is an attempted battery and a lesser included offense of battery. Accordingly, this instruction is modeled after the battery instruction in light of the Supreme Court's decision in *People v. Williams*, as well as the excerpts of authority given below.

Statutory Definition of Assault

Penal Code section 240 defines assault:

An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.

Statutory Definition of Assault with a Deadly Weapon on a Custodial Officer

Penal Code section 245.3 defines assault with a deadly weapon on a custodial officer:

Every person who commits an assault with a deadly weapon or instrument or by any means likely to produce great bodily injury upon the person of a custodial officer as defined in Section 831 or 831.5, and who knows or reasonably should know that such victim is such a custodial officer engaged in the performance of his duties, shall be punished by imprisonment in the state prison for three, four, or five years.

When a person is convicted of a violation of this section in a case involving use of a deadly weapon or instrument, and such weapon or instrument is owned by such person, the court may, in its discretion, order that the weapon or instrument be deemed a nuisance and shall be confiscated and destroyed in the manner provided by Section 12028.

Statutory Definition of Custodial Officer

Penal Code section 831(a) defines a custodial officer:

A custodial officer is a public officer, not a peace officer, employed by a law enforcement agency of a city or county who has the authority and responsibility for maintaining custody of prisoners and performs tasks related to the operation of a local detention facility used for the detention of persons usually pending arraignment or upon court order

either for their own safekeeping or for the specific purpose of serving a sentence therein.

Statutory Definition of Local Detention Facility

Penal Code section 6031.4 defines a local detention facility as follows:

- (a) For the purpose of this title, “local detention facility” means any city, county, city and county, or regional facility used for the confinement for more than 24 hours of adults, or of both adults and minors, but does not include that portion of a facility for the confinement of both adults and minors which is devoted only to the confinement of minors.
- (b) In addition to those provided for in subdivision (a), for the purposes of this title, “local detention facility” also includes any city, county, city and county, or regional facility, constructed on or after January 1, 1978, used for the confinement, regardless of the length of confinement, of adults or of both adults and minors, but does not include that portion of a facility for the confinement of both adults and minors which is devoted only to the confinement of minors.
- (c) “Local detention facility” also includes any adult detention facility, exclusive of any facility operated by the California Department of Corrections or any facility holding inmates pursuant to Section 2910.5, Chapter 4 (commencing with Section 3410) of Title 2 of, Chapter 9.2 (commencing with Section 6220) of Title 7 of Chapter 9.5 (commencing with Section 6250) of Title 7 of, or Chapter 9.6 (commencing with Section 6260) of Title 7 of, Part 3, that holds local prisoners under contract on behalf of cities, counties, or cities and counties. Nothing in this subdivision shall be construed as affecting or authorizing the establishment of private detention facilities.
- (d) For purposes of this title, a local detention facility does not include those rooms that are used for holding persons for interviews, interrogations, or investigations, and are either separate from a jail or located in the administrative area of a law enforcement facility.

Statutory Definition of Willfully

Penal Code section 7(1) defines willful[ly]:

The word “willfully,” when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

Our definition of willfully tracks the statutory language, but renders it in plainer language.

Mental State for Assault

People v. Williams (2001) 26 Cal.4th 779, 790, has the most recent pronouncement on the mental state for assault:

[W]e hold that assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.

878. Assault on Transportation Personnel or Passenger
With Deadly Weapon or Force Likely to Produce Great Bodily Injury

The defendant is charged [in Count __] with assault with (force likely to produce great bodily injury/a deadly weapon) on (a/an) (operator/driver/station agent/ticket agent/passenger) of (a/an) _____
<insert name of vehicle or transportation entity specified in Pen. Code, § 245.2>.

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—force with weapon>

[1. The defendant willfully did an act with a deadly weapon that would directly, naturally, and probably result in the application of force to a person.]

<Alternative 1B—force without weapon>

[1. The defendant willfully did an act that would directly, naturally, and probably result in the application of force to a person, and the force used was likely to produce great bodily injury.]

2. A reasonable person, knowing the same facts that the defendant knew, would realize that the defendant's act would directly, naturally, and probably have that result.

3. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon) to a person.

<Alternative 4A—transportation personnel>

[4. When the defendant acted, the person assaulted was performing (his/her) duties as (a/an) (operator/driver/station agent/ticket agent).]

<Alternative 4B—passenger>

[4. The person assaulted was a passenger of (a/an) _____ *<insert name of vehicle or transportation entity specified in Pen. Code, § 245.2>.*]

[AND]

39 **5. When the defendant acted, (he/she) knew, or reasonably should**
40 **have known, [both] that the person assaulted was (a/an)**
41 **(operator/driver/station agent/ticket agent/passenger) of (a/an)**
42 _____ *<insert name of vehicle or transportation entity specified*
43 *in Pen. Code, § 245.2> [and that (he/she) was performing (his/her)*
44 **duties].**

45
46 **[AND**

47
48 **6. The defendant did not act (in self-defense/ [or] in defense of**
49 **someone else).]**

50
51 **The terms *application of force* and *apply force* mean to touch in a harmful or**
52 **offensive manner. The slightest touching can be enough if it is done in a rude**
53 **or angry way. It is enough if the touching makes contact with the person,**
54 **including through his or her clothing. The touching need not cause pain or**
55 **injury of any kind.**

56
57 **[The touching can be done indirectly by causing an object [or someone else]**
58 **to touch the other person.]**

59
60 **The defendant need not have actually intended to use force against someone**
61 **when (he/she) acted. [Voluntary intoxication is not a defense to assault.]**

62
63 **No one needs to actually have been injured by defendant's act. But if someone**
64 **was injured, you may consider that fact, along with all the other evidence, in**
65 **deciding whether the defendant committed an assault[, and if so, what kind of**
66 **assault it was].**

67
68 **Someone commits an act *willfully* when he or she does it willingly or on**
69 **purpose. It is not required that he or she intend to break the law, hurt**
70 **someone else, or gain any advantage.**

71
72 **[*Great bodily injury* means significant or substantial physical injury.]**

73
74 **[A *deadly weapon* is any object, instrument, or weapon that is used in a way**
75 **capable of causing and likely to cause death or great bodily injury.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give element 1A if it is alleged the assault was committed with a deadly weapon. Give element 1B if it is alleged that the assault was committed with force likely to produce great bodily injury. (See Pen. Code, § 245.2.)

If the victim was an operator, driver, station agent, or ticket agent of an identified vehicle or transportation entity, give element 4A and the bracketed language in element 5. If the victim was a passenger, give element 4B and omit the bracketed language in element 5.

Give bracketed element 6 if the evidence raises an issue of defense of self or others.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of “attempted assault” in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522.)

AUTHORITY

Elements ▶ Pen. Code, §§ 240, 245, 245.2.

Willful Defined ▶ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

Deadly Weapon Defined ▶ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029.

Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790.

Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335, citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 72, p. 689.

LESSER INCLUDED OFFENSES

Assault ▶ Pen. Code, § 240.

STAFF NOTES

Penal Code section 245.2 defines assault with a deadly weapon on transportation personnel as follows:

Every person who commits an assault with a deadly weapon or instrument or by any means of force likely to produce great bodily injury upon the person of an operator, driver, or passenger on a bus, taxicab, streetcar, cable car, trackless trolley, or other motor vehicle, including a vehicle operated on stationary rails or on a track or rail suspended in the air, used for the transportation of persons for hire, or upon the person of a station agent or ticket agent for the entity providing such transportation, when the driver, operator, or agent is engaged in the performance of his or her duties, and where the person who commits the assault knows or reasonably should know that the victim is engaged in the performance of his or her duties, or is a passenger, shall be punished by imprisonment in the state prison for three, four, or five years.

Deadly weapon is defined in *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029:

As used in section 245, subdivision (a)(1), a “deadly weapon” is “any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury. (citations omitted)

879. Assault With Stun Gun or Taser®

1 **The defendant is charged [in Count __] with assault with a (stun gun/Taser).**

2
3 **To prove that the defendant is guilty of this crime, the People must prove**
4 **that:**

5
6 **1. The defendant willfully did an act with a (stun gun/Taser) that**
7 **would directly, naturally, and probably result in the application of**
8 **force to a person.**

9
10 **2. A reasonable person, knowing the same facts that the defendant**
11 **knew, would realize that the defendant's act would directly,**
12 **naturally, and probably have that result.**

13
14 **[AND]**

15
16 **3. When the defendant acted, (he/she) had the present ability to apply**
17 **force with a (stun gun/Taser) to a person.**

18
19 **[AND]**

20
21 **4. The defendant did not act (in self-defense/ [or] in defense of**
22 **someone else).]**

23
24 **[A stun gun is anything, except a Taser, that is used or intended to be used as**
25 **[a] [either an offensive or defensive] weapon and is capable of temporarily**
26 **immobilizing someone by inflicting an electrical charge.]**

27
28 **The terms *application of force* and *apply force* mean to touch in a harmful or**
29 **offensive manner. The slightest touching can be enough if it is done in a rude**
30 **or angry way. It is enough if the touching makes contact with the person,**
31 **including through his or her clothing. The touching need not cause pain or**
32 **injury of any kind.**

33
34 **[The touching can be done indirectly by causing an object [or someone else]**
35 **to touch the other person.]**

36
37 **The defendant need not have actually intended to use force against someone**
38 **when (he/she) acted. [Voluntary intoxication is not a defense to assault.]**

40 No one needs to actually have been injured by defendant's act. But if someone
41 was injured, you may consider that fact, along with all the other evidence, in
42 deciding whether the defendant committed an assault[, and if so, what kind of
43 assault it was].

44
45 Someone commits an act *willfully* when he or she does it willingly or on
46 purpose. It is not required that he or she intend to break the law, hurt
47 someone else, or gain any advantage.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give bracketed element 4 if the evidence raises an issue of defense of self or others.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522.)

AUTHORITY

Elements ▶ Pen. Code, §§ 240, 244.5.

Willful Defined ▶ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790.

Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335, citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12.

Taser Described ▶ See *People v. Heffner* (1977) 70 Cal.App.3d 643, 647.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 52, p. 674.

LESSER INCLUDED OFFENSES

Assault ▶ Pen. Code, § 240.

STAFF NOTES

Penal Code section 244.5 defines assault with a stun gun or taser:

- (a) As used in this section, “stun gun” means any item, except a taser, used or intended to be used as either an offensive or defensive weapon that is capable of temporarily immobilizing a person by the infliction of an electrical charge.
- (b) Every person who commits an assault upon the person of another with a stun gun or taser shall be punished by imprisonment in the state prison for 16 months, two or three years. . . .
- (d) This section shall not be construed to preclude or in any way limit the applicability of Section 245 in any criminal prosecution.

One type of taser was described in the facts to *People v. Heffner* (1977) 70 Cal.App.3d 643, 647:

The Taser involved herein is a model TF-1. As described by defendant, the Taser is a handheld, flashlight configured plastic weapon which contains an electrical supply unit and into which expendable plastic cassettes are inserted. The cassettes contain insulated wires attached to barbed contactors. The contactors are deployed (up to a distance of 15 feet) by the electrical ignition of a squib containing four-fifths of a grain of smokeless powder. Upon deployment on the target area, a pulsed low-amperage current is carried to the barbed contactors via the insulated wires. The current passes into the body of the target and will temporarily incapacitate him. To supplement this description, each of the two chambers of the instrument into which a cassette is inserted and from which the contactors are expelled has a square muzzle and is longer in depth than in height or width; in other words, each chamber has the shape of a rectangular parallelepipedon or elongated cube. Each cassette is of the same configuration as each chamber and fits snugly into it. The Taser is a recent innovation in weaponry and has been the subject of some controversy; it has elicited comment from a number of public officials regarding its legal status.

880. Assault on Firefighter or Peace Officer With Stun Gun or Taser®

1 **The defendant is charged [in Count ____] with assault with a (stun gun/Taser)**
2 **on a (firefighter/peace officer).**

3
4 **To prove that the defendant is guilty of this crime, the People must prove**
5 **that:**

- 6
7 **1. The defendant willfully did an act with a (stun gun/Taser) that**
8 **would directly, naturally, and probably result in the application of**
9 **force to a person.**
10
11 **2. A reasonable person, knowing the same facts that the defendant**
12 **knew, would realize that the defendant's act would directly,**
13 **naturally, and probably have that result.**
14
15 **3. When the defendant acted, (he/she) had the present ability to apply**
16 **force with a (stun gun/Taser) to a person.**
17
18 **4. When the defendant acted, the person assaulted was lawfully**
19 **performing (his/her) duties as a (firefighter/peace officer).**
20

21 **[AND]**

- 22
23 **5. When the defendant acted, (he/she) knew, or reasonably should**
24 **have known, that the person assaulted was a (firefighter/peace**
25 **officer) who was performing (his/her) duties.**
26

27 **[AND]**

- 28
29 **6. The defendant did not act (in self-defense/ [or] in defense of**
30 **someone else).]**
31

32 **[A *stun gun* is anything, except a Taser, that is used or intended to be used as**
33 **[a] [either an offensive or defensive] weapon and is capable of temporarily**
34 **immobilizing someone by inflicting an electrical charge.]**
35

36 **The terms *application of force* and *apply force* mean to touch in a harmful or**
37 **offensive manner. The slightest touching can be enough if it is done in a rude**
38 **or angry way. It is enough if the touching makes contact with the person,**

including through his or her clothing. The touching need not cause pain or injury of any kind.

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

The defendant need not have actually intended to use force against someone when (he/she) acted. [Voluntary intoxication is not a defense to assault.]

No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[, and if so, what kind of assault it was].

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[A sworn member of _____ <insert name of agency that employs peace officer >, authorized by _____ <insert appropriate section from Pen. Code, § 830 et seq.> to _____ <describe statutory authority>, is a **peace officer**.]

[The duties of a _____ <insert title of peace officer specified in Pen. Code, § 830 et seq.> include _____ <insert job duties>.]

[A *firefighter* includes anyone who is an officer, employee, or member of a (governmentally operated (fire department/fire protection or firefighting agency) in this state/federal fire department/federal fire protection or firefighting agency), whether or not he or she is paid for his or her services.]

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force when (making/attempting to make) an otherwise lawful arrest or detention).] <Give one or more of the following bracketed paragraphs defining lawfulness of officer's conduct if these instructions are not already given to the jury in the instructions for a greater offense. If the instructions have already been given, use the first bracketed paragraph below.>

<Instruction Already Given>

[Instruction _____ <insert instruction number> explains when an officer is (unlawfully arresting or detaining someone/ [or] using unreasonable or

81 excessive force when (making/attempting to make) an otherwise lawful arrest
82 or detention).]

83
84 <A. *Unlawful Detention*>

85 [A peace officer may legally detain someone if:

- 86
87 1. He or she knows specific facts that lead him or her to suspect that
88 the person to be detained has been, is, or is about to be involved in
89 activity relating to crime.

90
91 AND

- 92
93 2. A reasonable officer who knew the same facts would have the same
94 suspicion.

95
96 Any other detention is unlawful.

97
98 In deciding whether the detention was unlawful, consider evidence of the
99 officer's training and experience and all the circumstances known by the
100 officer when he or she detained the person.]

101
102 <B. *Unlawful Arrest*>

103 [A peace officer may legally arrest someone [either] (on the basis of an arrest
104 warrant/ [or] if he or she has probable cause to make the arrest).

105
106 Any other arrest is unlawful.

107
108 An officer has *probable cause* to arrest when he or she knows facts that would
109 lead a person of ordinary care and prudence to honestly and strongly suspect
110 that the person to be arrested is guilty of a crime.

111
112 [In order for an officer to lawfully arrest someone without a warrant for a
113 misdemeanor or infraction, the officer must have probable cause to believe
114 that the person to be arrested committed a misdemeanor or infraction in the
115 officer's presence.]

116
117 [[On the other hand,] (In/in) order for an officer to lawfully arrest someone
118 for a (felony/ [or] _____ <insert misdemeanor not requiring commission in
119 officer's presence; see Bench Notes>) without a warrant, that officer must have
120 probable cause to believe the person to be arrested committed a (felony/ [or]
121 _____ <insert misdemeanor not requiring commission in officer's presence;
122 see Bench Notes>). However, it is not required that the offense be committed
123 in the officer's presence.]

_____ <insert crime that was basis for arrest> is a
(felony/misdemeanor/infraction).

[In order for an officer to enter a home without a warrant to arrest someone:

1. The officer must have probable cause to believe that the person to be arrested committed a crime.

AND

2. Exigent circumstances require the officer to enter the home without a warrant.

The term *exigent circumstances* describes an emergency situation that requires swift action to prevent (1) imminent danger to life or serious damage to property, or (2) the imminent escape of a suspect or destruction of evidence.]

[The officer must tell that person that the officer intends to arrest him or her, why the arrest is being made, and the authority for the arrest.] [The officer does not have to tell the arrested person these things if the officer has probable cause to believe that the person is committing or attempting to commit a crime, is fleeing after having committed a crime, or has escaped from custody.][The officer must also tell the arrested person the offense for which (he/she) is being arrested if (he/she) asks for that information.]]

<C. Use of Force>

[Special rules control the use of force.

A peace officer may use reasonable force to arrest or detain someone, to prevent escape, to overcome resistance, or in self-defense.

If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her, the person must not use force or any weapon to resist an officer's use of reasonable force.

If a peace officer uses unreasonable or excessive force while (arresting/attempting to arrest/detaining/attempting to detain) a person, that person may lawfully use reasonable force to defend (himself/herself).

A person being arrested uses reasonable force when he or she uses that degree of force that he or she actually believes is reasonably necessary to

167 **protect himself or herself from the officer’s use of unreasonable or excessive**
168 **force. The force must be no more than a reasonable person in the same**
169 **situation would believe is necessary for his or her protection.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

The court has a **sua sponte** duty to instruct on defendant’s reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168.) On request, the court must instruct that the People have the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145.) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47.)

Give bracketed element 6 if the evidence raises an issue of defense of self or others.

Give the appropriate bracketed paragraphs on the lawfulness of the officer’s conduct and use of force if those instructions have not already been given in the instructions for a greater offense. If the instructions have been given, use the bracketed paragraph directing the jury to that other instruction.

In the paragraphs headed “A. Unlawful Detention,” if the case presents a factual issue of whether the defendant was in fact detained, the court should provide the jury with a definition of when a person is legally detained.

In the paragraphs headed “B. Unlawful Arrest,” several options are given depending on the crime for which the arrest was made. The general rule is that an officer may not make an arrest for a misdemeanor or infraction unless the offense was committed in the officer’s presence. (See Pen. Code, § 836(a)(1).) Statutes provide exceptions to this requirement for some misdemeanors. (See, e.g., Pen. Code, § 836(c) [violation of domestic violence protective or restraining order]; Veh. Code, § 40300.5 [driving under the influence plus traffic accident or other specified circumstance].) If the defense does not rely on the statutory limitation, neither bracketed paragraph regarding arrest without a warrant need be given. If the only offense on which the officer relied in making the arrest is a nonexempted

misdemeanor or an infraction, give the first bracketed paragraph beginning “In order for an officer to lawfully arrest someone without a warrant” If the officer allegedly made the arrest for both a misdemeanor or infraction *and* a felony or exempted misdemeanor, give both bracketed paragraphs.

In cases involving multiple crimes, use the paragraph that specifies the crime that was the basis for the arrest as many times as needed to describe each underlying crime separately.

Give the bracketed language about entering a home under exigent circumstances if the arrest took place in the defendant’s home. (*People v. Wilkins* (1993) 14 Cal.App.4th 761, 777.)

The jury must determine whether the victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445.) The court may instruct the jury on the appropriate definition of “peace officer” from the statute (e.g., “a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers”). (*Ibid.*) However, the court may not instruct the jury that the victim was a peace officer as a matter of law (e.g., “Officer Reed was a peace officer”). (*Ibid.*)

Do not give an attempt instruction in conjunction with this instruction. There is no crime of “attempted assault” in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522.)

AUTHORITY

Elements ▶ Pen. Code, §§ 240, 244.5.

Firefighter Defined ▶ Pen. Code, § 245.1.

Peace Officer Defined ▶ Pen. Code, § 830 et seq.

Willful Defined ▶ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790.

Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335, citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12.

Taser Described ▶ See *People v. Heffner* (1977) 70 Cal.App.3d 643, 647.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 65, p. 684.

LESSER INCLUDED OFFENSES

Assault ▶ Pen. Code, § 240.

STAFF NOTES

Penal Code section 244.5 defines assault with a stun gun or taser:

- (a) As used in this section, “stun gun” means any item, except a taser, used or intended to be used as either an offensive or defensive weapon that is capable of temporarily immobilizing a person by the infliction of an electrical charge.
- (b) Every person who commits an assault upon the person of another with a stun gun or taser shall be punished by imprisonment in the state prison for 16 months, two or three years.
- (c) Every person who commits an assault upon the person of a peace officer or firefighter with a stun gun or taser, who knows or reasonably should know that the person is a peace officer or firefighter engaged in the performance of his or her duties, when the peace officer or firefighter is engaged in the performance of his or her duties, shall be punished by imprisonment in the county jail for a term not exceeding one year, or by imprisonment in the state prison for two, three, or four years.
- (d) This section shall not be construed to preclude or in any way limit the applicability of Section 245 in any criminal prosecution.

Firefighter is defined in Penal Code Section 245.1 as:

As used in Sections 148.2, 241, 243, 244.5, and 245, “fireman” or “firefighter” includes any person who is an officer, employee or member of a fire department or fire protection or firefighting agency of the federal government, the State of California, a city, county, city and county, district, or other public or municipal corporation or political subdivision of this state, whether this person is a volunteer or partly paid or fully paid.

Peace officer is defined in Penal Code sections 830 et seq. in provisions too lengthy to set forth here.

881. Assault With Caustic Chemicals

1 **The defendant is charged [in Count __] with assault with caustic chemicals.**

2
3 **To prove that the defendant is guilty of this crime, the People must prove**
4 **that:**

- 5
6 **1. The defendant willfully and maliciously (placed/threw/caused to be**
7 **placed/caused to be thrown) any (caustic chemical/corrosive**
8 **acid/flammable substance/vitriol) on someone else.**

9
10 **AND**

- 11
12 **2. When the defendant acted, (he/she) intended to injure the flesh of or**
13 **disfigure the other person's body.**

14
15 **A *flammable substance* includes gasoline, petroleum products, or flammable**
16 **liquids with a flashpoint of 150 degrees Fahrenheit or less.**

17
18 **Someone commits an act *willfully* when he or she does it willingly or on**
19 **purpose. It is not required that he or she intend to break the law.**

20
21 **Someone acts *maliciously* when he or she intentionally does a wrongful act or**
22 **when he or she acts with the intent to disturb, defraud, annoy, or injure**
23 **someone else.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522.)

AUTHORITY

Elements ► Pen. Code, § 244.

Malicious Defined ▶ Pen. Code, § 7(4).

Willful Defined ▶ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

Simple Assault Not a Lesser Included Offense ▶ *People v. Warren* (1963) 223 Cal.App.2d 798, 801.

Threat of Great Bodily Harm Not Required ▶ *People v. Day* (1926) 199 Cal. 78, 85–86.

Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 53, pp. 674–675.

STAFF NOTES

Penal Code section 244 defines assault with caustic chemicals as follows:

Any person who willfully and maliciously places, or throws, or causes to be placed or thrown, upon the person of another, any vitriol, corrosive acid, flammable substance, or caustic chemical of any nature, with the intent to injure the flesh or disfigure the body of that person, is punishable by imprisonment in the state prison for two, three or four years.

As used in this section, “flammable substance” means gasoline, petroleum products, or flammable liquids with a flashpoint of 150 degrees Fahrenheit or less.

882. Assault by Conditional Threat

1 **The defendant is charged [in Count __] with assault by conditional threat.**

2
3 **To prove that the defendant is guilty of this crime, the People must prove**
4 **that:**

- 5
6 **1. The defendant willfully made a conditional threat.**
7
8 **2. A reasonable person, knowing the same facts that the defendant**
9 **knew, would realize that the defendant's threatened act would**
10 **directly, naturally, and probably result in the application of force to**
11 **a person [if the condition was not performed].**
12
13 **3. When the defendant made the threat, (he/she) had the present**
14 **ability to apply force to a person.**
15

16 **[AND]**

- 17
18 **4. (He/She) placed (himself/herself) in a position to compel**
19 **performance of the condition and went as far as it was necessary to**
20 **go to carry out (his/her) intention.**
21

22 **[AND]**

- 23
24 **5. The defendant did not act (in self-defense/ [or] in defense of**
25 **someone else).]**
26

27 **The defendant made a conditional threat if:**

- 28
29 **1. (He/She) made a threat that required immediate performance of a**
30 **condition.**
31
32 **2. (He/She) had no right to impose the condition.**
33

34 **AND**

- 35
36 **3. (He/She) intended to immediately compel performance of the**
37 **condition by violence or force.**
38

39 The terms *application of force* and *apply force* mean to touch in a harmful or
40 offensive manner. The slightest touching can be enough if it is done in a rude
41 or angry way. It is enough if the touching makes contact with the person,
42 including through his or her clothing. The touching need not cause pain or
43 injury of any kind.

44
45 [The touching can be done indirectly by causing an object [or someone else]
46 to touch the other person.]

47
48 No one needs to actually have been injured by defendant's act. But if someone
49 was injured, you may consider that fact, along with all the other evidence, in
50 deciding whether the defendant committed an assault[, and if so, what kind of
51 assault it was].

52
53 Someone commits an act *willfully* when he or she does it willingly or on
54 purpose.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522.)

AUTHORITY

Elements ► *People v. McMakin* (1857) 8 Cal. 547, 548–549; *People v. McCoy* (1944) 25 Cal.2d 177, 192–193.

Mental State for Assault ► *People v. Williams* (2001) 26 Cal.4th 779, 790.

Least Touching ► *People v. Myers* (1998) 61 Cal.App.4th 328, 335, citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 45, pp. 668–669.

STAFF NOTES

Elements

The leading case on conditional threats, *People v. McMakin* (1857) 8 Cal. 547, 548–549, held the following:

It is true the threat was conditional, but the condition was present, and not future, and the compliance demanded was immediate. Where a party puts in a condition which must be at once performed, and which condition he has no right to impose, and his intent is immediately to enforce performance by violence, and he places himself in a position to do so, and proceeds as far as it is then necessary for him to go in order to carry out his intention, then it is as much an assault as if he had actually struck, or shot, at the other party, and missed him.

See also *People v. Lipscomb* (1993) 17 Cal.App.4th 564, 570 [assault with firearm; quoted *McMakin*; defendant warned victim that he “didn’t want to have to shoot”]; *People v. McCoy* (1944) 25 Cal.2d 177, 192–193 [assault with deadly weapon; quoted *McMakin*; defendant warned victim “don’t make any noise or I’ll use this knife”].

883. Insulting Words Are Not a Defense

1 **Words, no matter how offensive, and acts that are not threatening, are not**
2 **enough to justify an assault or battery.**
3
4 **[However, if you conclude that _____ <insert name> spoke or acted in a**
5 **way that threatened _____ <insert name of defendant or third party**
6 **allegedly threatened> with immediate harm [or great bodily injury/ [or]**
7 **trespass on land/ [or] trespass against goods], you may consider that evidence**
8 **in deciding whether _____ <insert name of defendant> acted in (self-**
9 **defense/ [or] defense of others).]**

BENCH NOTES

Instructional Duty

There is no sua sponte duty to give this instruction. It is no defense to battery or assault that insulting or offensive words, or acts that fall short of a threat of immediate harm, were used. (*People v. Mayes* (1968) 262 Cal.App.2d 195, 197; *People v. Mueller* (1956) 147 Cal.App.2d 233, 239–240.)

If the evidence raises the issue of defense of self or others, give the bracketed paragraph along with any other appropriate defense instruction. (See Instructions 690-697.)

AUTHORITY

Instructional Requirements ▶ See *People v. Davis* (1995) 10 Cal.4th 463, 542;
People v. Mueller (1956) 147 Cal.App.2d 233, 239–240.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person,
§ 6, pp. 642.

STAFF NOTES

Elements

The court in *People v. Mueller* (1956) 147 Cal.App.2d 233, 239–240, held there was no error in giving the following instruction:

No words of abuse, insult or reproach addressed to a person or uttered concerning him, howsoever grievous or opprobrious the words may be, if unaccompanied by any threat of great bodily injury or any assault upon the person or any trespass against lands or goods, will justify him in an assault with a deadly weapon and the provocation only of such words will not constitute a defense to a charge of having committed such an assault.

The Supreme Court in *People v. Davis* (1995) 10 Cal.4th 463, 542, held that it was not prejudicial to instruct the jury as follows:

No provocative act which does not amount to a threat or attempt to inflict physical injury and no words, no matter how offending or exasperating, are sufficient to justify a battery.

The rule is also stated in *People v. Mayes* (1968) 262 Cal.App.2d 195, 197 as follows:

[N]o provocative act which does not amount to a threat or attempt to inflict injury, and no conduct or words, no matter how offensive or exasperating, are sufficient to justify a battery.

See also *People v. Chavez* (1968) 268 Cal.App.2d 381, 384 [“opprobrious insults, no matter how grievous, will not justify an aggravated assault”]; *People v. Richardson* (1959) 176 Cal.App.2d 238, 240 [“[n]o words of abuse, insult, or reproach, no matter how grievous, will justify an assault with a deadly weapon”].

Homicide in Heat of Passion

Although heat of passion is available as a defense to homicide (see Pen. Code, § 195(2)) and insulting words or gestures not amounting to an assault may be sufficient provocation for voluntary manslaughter (see Pen. Code, § 192(a) [voluntary manslaughter under heat of passion]; *People v. Valentine* (1946) 28 Cal.2d 121, 137), the defense of heat of passion is not available against a charge of battery, as stated in *People v. Mayes* (1968) 262 Cal.App.2d 195, 197:

[T]he immunity provided by Penal Code section 195 as to a homicide has not been extended to a battery. . . . [T]he only legal justification of battery is self-defense.

Misdemeanor Fighting Words

Even though insulting words are not available as a defense against assault or battery, it is a misdemeanor to “use[] offensive words in a public place which are inherently likely to provoke an immediate violent reaction.” (Pen. Code, § 415(3).) But the offensive words must be examined in the context in which they were used, as discussed in *In re Alejandro G.* (1995) 37 Cal.App.4th 44, 48:

Whether offensive words uttered in a public place are inherently likely to provoke an immediate violent reaction must be decided on a case-by-case basis. “[T]he mere use of a vulgar, profane, indecorous, scurrilous, opprobrious epithet cannot alone be grounds for prosecution . . . [¶] The context in which the words are used must be considered, and there must be a showing that the words were uttered in a provocative manner, so that there was a clear and present danger violence would erupt.” [Citation.]

885. Assault Committed on School or Park Property

1 **The defendant is charged [in Count ____] with assaulting a person on**
2 **(school/park) property.**

3
4 **To prove that the defendant is guilty of this crime, the People must prove**
5 **that:**

- 6
7 **1. The defendant willfully did an act that would directly, naturally,**
8 **and probably result in the application of force to a person.**
9
10 **2. A reasonable person, knowing the same facts that the defendant**
11 **knew, would realize that the defendant's act would directly,**
12 **naturally, and probably have that result.**
13
14 **3. When the defendant acted, (he/she) had the present ability to apply**
15 **force to a person.**
16

17 **[AND]**

- 18
19 **4. When the defendant acted, (he/she) was on (school/park) property.**
20

21 **[AND]**

- 22
23 **5. The defendant did not act (in self-defense/ [or] in defense of**
24 **someone else).]**
25

26 **[A *school* is any (elementary school/junior high school/four-year high**
27 **school/senior high school/adult school [or any branch thereof]/opportunity**
28 **school/continuation high school/regional occupational center/evening high**
29 **school/technical school/community college).]**
30

31 **[A *park* is any publicly maintained or operated park. It does not include any**
32 **facility that is being used for professional sports or commercial events.]**
33

34 **The terms *application of force* and *apply force* mean to touch in a harmful or**
35 **offensive manner. The slightest touching can be enough if it is done in a rude**
36 **or angry way. It is enough if the touching makes contact with the person,**
37 **including through his or her clothing. The touching need not cause pain or**
38 **injury of any kind.**
39

40 [The touching can be done indirectly by causing an object [or someone else]
41 to touch the other person.]

42
43 The defendant need not have actually intended to use force against someone
44 when (he/she) acted. [Voluntary intoxication is not a defense to assault.]

45
46 No one needs to actually have been injured by defendant's act. But if someone
47 was injured, you may consider that fact, along with all the other evidence, in
48 deciding whether the defendant committed an assault[, and if so, what kind of
49 assault it was].

50
51 Someone commits an act *willfully* when he or she does it willingly or on
52 purpose. It is not required that he or she intend to break the law, hurt
53 someone else, or gain any advantage.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give bracketed element 5 if the evidence raises an issue of defense of self or others.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522.)

AUTHORITY

Elements ▶ Pen. Code, §§ 240, 241.2.

Willful Defined ▶ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790.

Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335, citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 22, pp. 651–652.

STAFF NOTES

An assault is an attempted battery and a lesser included offense of battery. Accordingly, this instruction is modeled after the battery instruction in light of the Supreme Court's decision in *People v. Williams*, as well as the excerpts of authority given below.

Violent Injury

"[T]he term "violent injury" used in defining an assault is not synonymous with term "bodily harm," but includes "any wrongful act committed by means of physical force against the person of another." (*People v. Herrera* (1970) 6 Cal.App.3d 846, 851.)

Statutory Definition of Assault

Penal Code section 240 defines assault:

An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.

Statutory Definition of Assault on School or Park Property

Penal Code section 241.2 defines assault on school or park property:

(a)(1) When an assault is committed on school or park property against any person, the assault is punishable by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

. . .

(b) "School," as used in this section, means any elementary school, junior high school, four-year high school, senior high school, adult school or any branch thereof, opportunity school, continuation high school, regional occupational center, evening high school, technical school, or community college.

(c) "Park," as used in this section, means any publicly maintained or operated park. It does not include any facility when used for professional sports or commercial events.

Statutory Definition of Willfully

Penal Code section 7(1) defines willful[ly]:

The word "willfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the

act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

Our definition of willfully tracks the statutory language, but renders it in plainer language.

Mental State for Assault

People v. Williams (2001) 26 Cal.4th 779, 790, has the most recent pronouncement on the mental state for assault:

[W]e hold that assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.

886. Assault Committed on Public Transportation Provider's Property or Vehicle

1 **The defendant is charged [in Count __] with assaulting a person on a public**
2 **transportation provider's (property/vehicle).**

3
4 **To prove that the defendant is guilty of this crime, the People must prove**
5 **that:**

6
7 **1. The defendant willfully did an act that would directly, naturally,**
8 **and probably result in the application of force to a person.**

9
10 **2. A reasonable person, knowing the same facts that the defendant**
11 **knew, would realize that the defendant's act would directly,**
12 **naturally, and probably have that result.**

13
14 **3. When the defendant acted, (he/she) had the present ability to apply**
15 **force to a person.**

16
17 **[AND]**

18
19 **4. When the defendant acted, (he/she) was on (the property of a public**
20 **transportation provider/a motor vehicle of a public transportation**
21 **provider).**

22
23 **[AND]**

24
25 **5. The defendant did not act (in self-defense/ [or] in defense of**
26 **someone else).]**

27
28 ***A public transportation provider* is a public or private operator of a**
29 **(bus/taxicab/streetcar/cable car/trackless trolley/school bus/ [or] other motor**
30 **vehicle) that transports people for (money/hire).**

31
32 **[A *motor vehicle* includes a vehicle that runs on stationary rails or on a track**
33 **or rail suspended in the air.]**

34
35 **[The property of the transportation provider includes the entire station where**
36 **public transportation is available and the parking lot reserved for those who**
37 **use the system.]**

39 The terms *application of force* and *apply force* mean to touch in a harmful or
40 offensive manner. The slightest touching can be enough if it is done in a rude
41 or angry way. It is enough if the touching makes contact with the person,
42 including through his or her clothing. The touching need not cause pain or
43 injury of any kind.

44
45 [The touching can be done indirectly by causing an object [or someone else]
46 to touch the other person.]

47
48 The defendant need not have actually intended to use force against someone
49 when (he/she) acted. [Voluntary intoxication is not a defense to assault.]

50
51 No one needs to actually have been injured by defendant's act. But if someone
52 was injured, you may consider that fact, along with all the other evidence, in
53 deciding whether the defendant committed an assault[, and if so, what kind of
54 assault it was].

55
56 Someone commits an act *willfully* when he or she does it willingly or on
57 purpose. It is not required that he or she intend to break the law, hurt
58 someone else, or gain any advantage.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give bracketed element 5 if the evidence raises an issue of defense of self or others.

Do not give an attempt instruction in conjunction with this instruction. There is no crime of "attempted assault" in California. (*In re James M.* (1973) 9 Cal.3d 517, 519, 521–522.)

AUTHORITY

Elements ▶ Pen. Code, §§ 240, 241.3.

Willful Defined ▶ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790.

Least Touching ▶ *People v. Myers* (1998) 61 Cal.App.4th 328, 335, citing *People v. Rocha* (1971) 3 Cal.3d 893, 899–900, fn. 12.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person,
§ 6, p. 642 (assault generally).

STAFF NOTES

An assault is an attempted battery and a lesser included offense of battery. Accordingly, this instruction is modeled after the battery instruction in light of the Supreme Court's decision in *People v. Williams*, as well as the excerpts of authority given below.

Violent Injury

"[T]he term "violent injury" used in defining an assault is not synonymous with term "bodily harm," but includes "any wrongful act committed by means of physical force against the person of another." (*People v. Herrera* (1970) 6 Cal.App.3d 846, 851.)

Statutory Definition of Assault

Penal Code section 240 defines assault:

An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.

Statutory Definition of Assault on Public Transportation

Provider's Property or Vehicle

Penal Code section 241.3 defines assault on a public transportation provider's property or vehicle:

- (a) When an assault is committed against any person on the property of, or on a motor vehicle of, a public transportation provider, the offense shall be punished by a fine not to exceed two thousand dollars (\$2,000), or by imprisonment in a county jail not to exceed one year, or by both the fine and imprisonment.
- (b) As used in this section, "public transportation provider" means a publicly or privately owned entity that operates, for the transportation of persons for hire, a bus, taxicab, streetcar, cable car, trackless trolley, or other motor vehicle, including a vehicle operated on stationary rails or on a track or rail suspended in air, or that operates a school bus.
- (c) As used in this section, "on the property of " means the entire station where public transportation is available, including the parking lot reserved for the public who utilize the transportation system.

Statutory Definition of Willfully

Penal Code section 7(1) defines willful[ly]:

The word “willfully,” when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

Our definition of willfully tracks the statutory language, but renders it in plainer language.

Mental State for Assault

People v. Williams (2001) 26 Cal.4th 779, 790, has the most recent pronouncement on the mental state for assault:

[W]e hold that assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.

890. Shooting Firearm in Grossly Negligent Manner

1 **The defendant is charged [in Count __] with shooting a firearm in a grossly**
2 **negligent manner.**

3
4 **To prove that the defendant is guilty of this crime, the People must prove**
5 **that:**

6
7 **1. The defendant willfully shot a firearm.**

8
9 **2. The defendant did the shooting with gross negligence.**

10
11 **[AND]**

12
13 **3. The shooting could have resulted in the injury or death of a person.**

14
15 **[AND]**

16
17 **4. The defendant did not act (in self-defense/ [or] in defense of**
18 **someone else).]**

19
20 **Someone commits an act *willfully* when he or she does it willingly or on**
21 **purpose. It is not required that he or she intend to break the law, hurt**
22 **someone else, or gain any advantage.**

23
24 ***Gross negligence* involves more than ordinary carelessness, inattention, or**
25 **mistake in judgment. A person acts with gross negligence when:**

26
27 **1. He or she acts in a reckless way that creates a high risk of death or**
28 **great bodily injury.**

29
30 **AND**

31
32 **2. A reasonable person would have known that acting in that way**
33 **would create such a risk.**

34
35 **In other words, a person acts with gross negligence when the way he or she**
36 **acts is so different from the way an ordinarily careful person would act in the**
37 **same situation that his or her act amounts to disregard for human life or**
38 **indifference to the consequences of that act.**
39

40 [Great bodily injury means significant or substantial physical injury.]
41
42 A firearm is any device designed to be used as a weapon, from which a
43 projectile is expelled through a barrel by the force of an explosion or other
44 form of combustion.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give bracketed element 4 if the evidence raises an issue of defense of self or others.

AUTHORITY

Elements ▶ Pen. Code, § 246.3; *People v. Alonzo* (1993) 13 Cal.App.4th 535, 538 [intentional, unlawful discharge]; see *People v. Feaster* (2002) 102 Cal.App.4th 1084, 1093.

Firearm Defined ▶ Pen. Code, § 12001(b).

Willful Defined ▶ Pen. Code, § 7, subd. 1; *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438.

Gross Negligence Defined ▶ *People v. Alonzo* (1993) 13 Cal.App.4th 535, 540; see *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [criminal negligence for homicide].

Intent to Fire Weapon ▶ *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438–1439, 1440 [honest belief gun is empty negates the mental state].

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 48, p. 672.

LESSER INCLUDED OFFENSES

Unlawful possession by a minor of a firearm capable of being concealed on the person (see Pen. Code, § 12101(a)) is not a necessarily included offense of unlawfully discharging a firearm with gross negligence. (*In re Giovanni M.* (2000) 81 Cal.App.4th 1061, 1066.)

RELATED ISSUES

Second Degree Felony Murder

“Willful discharge of a firearm with gross negligence . . . poses a sufficient danger to human life to support a conviction for second degree felony murder.” (*People v. Clem* (2000) 78 Cal.App.4th 346, 351; see Instruction 731, Felony Murder: Second Degree.) However, there is a split in authority on whether the merger doctrine applies. (See *People v. Robertson* (June 30, 2003, A095055) 2003 D.A.R. 7261, 7267 [holding merger doctrine applies] review granted, opn. ordered depublished October 1, 2003, S118034; *People v. Randle* (2003) 109 Cal.App.4th 313 [holding it does not] review granted, opn. ordered depublished Aug. 27, 2003, S117370.)

STAFF NOTES

Elements

Penal Code section 246.3 provides:

Except as otherwise authorized by law, any person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of a public offense and shall be punished by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison.

Section 246.3 was intended to deter discharge of firearms on holidays. (*People v. Alonzo* (1993) 13 Cal.App.4th 535, 539.)

The elements of a section 246.3 offense are summarized in *People v. Alonzo* (1993) 13 Cal.App.4th 535, 538:

It appears from the language of the statute, however, that the prosecution was required to produce some evidence of the following elements in order to justify an order holding him to answer to the charge: (1) the defendant unlawfully discharged a firearm; (2) the defendant did so intentionally; (3) the defendant did so in a grossly negligent manner which could result in the injury or death of a person.

Alonzo adds the “unlawful” requirement in dictum. If self-defense is raised, the People will need to prove element 4, which will necessarily prove the act was unlawful.

Willful or Intentional Discharge

A willful discharge of a firearm requires that the prohibited act occur intentionally, as discussed in *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438–1439, 1440:

The Legislature’s use of the term “willfully” means that the prohibited conduct must be performed purposefully or intentionally. The prohibited conduct, the discharge of a firearm, is commonly understood to mean the firing or shooting of a weapon by expelling the charge or bullet. Thus, the statute’s plain language requires proof that a defendant purposefully, willingly, or intentionally fired the weapon, with the added requirement that the firing occurred in a grossly negligent manner which could result in injury or death. . . . Proof of an intentional discharge of the firearm was required, and an honest belief that a gun is empty negatives the mental state of an intent to fire the gun. The two mental states cannot coexist.

Gross Negligence

“Gross negligence” is defined in *People v. Alonzo* (1993) 13 Cal.App.4th 535, 540:

Gross negligence, as a basis for criminal liability, requires a showing that the defendant's act was “ ‘such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to consequences.’ ” (*People v. Penny* (1955) 44 Cal.2d 861, 879 . . ., quoting 26 Am.Jur., Homicide, § 210, p. 299; CALJIC No. 3.36).

Firearm Defined

The definition of “firearm” is borrowed from instruction 875, Assault With a Deadly Weapon or Force Likely to Produce Great Bodily Injury, which is based on Penal Code section 12001(b):

As used in this title, “firearm” means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion.

891. Shooting at Inhabited House or Occupied Motor Vehicle

1 **The defendant is charged [in Count __] with shooting at an (inhabited**
2 **house/inhabited house car/inhabited camper/occupied building/occupied**
3 **motor vehicle/occupied aircraft).**

4
5 **To prove that the defendant is guilty of this crime, the People must prove**
6 **that:**

7
8 **1. The defendant willfully and maliciously shot a firearm.**

9
10 **[AND]**

11
12 **2. The defendant shot the firearm at an (inhabited house/inhabited**
13 **house car/inhabited camper/occupied building/occupied motor**
14 **vehicle/occupied aircraft).**

15
16 **[AND]**

17
18 **3. The defendant did not act (in self-defense/ [or] in defense of**
19 **someone else).]**

20
21 **Someone commits an act *willfully* when he or she does it willingly or on**
22 **purpose. It is not required that he or she intend to break the law, hurt**
23 **someone else, or gain any advantage.**

24
25 **Someone acts *maliciously* when he or she intentionally does a wrongful act or**
26 **when he or she acts with the intent to disturb, defraud, annoy, or injure**
27 **someone else.**

28
29 **[A (house/house car/camper) is *inhabited* if someone uses it as a dwelling,**
30 **whether or not someone is inside at the time of the alleged shooting.]**

31
32 **[A house includes any (structure/garage/office/_____<insert other**
33 **structure>) that is attached to the house and functionally connected with it.]**

34
35 **[A *motor vehicle* includes a (passenger vehicle/motorcycle/motor**
36 **scooter/bus/school bus/commercial vehicle/truck tractor and**
37 **trailer/_____ <insert other type of motor vehicle>).]**
38

39 [A *house car* is a motor vehicle originally designed, or permanently altered,
40 and equipped for human habitation, or to which a camper has been
41 permanently attached.]

42
43 [A *camper* is a structure designed to be mounted upon a motor vehicle and to
44 provide facilities for human habitation or camping purposes.]

45
46 [An *aircraft* is an airplane or other craft intended for and capable of
47 transporting persons through the air.]

48
49 [A *firearm* is any device designed to be used as a weapon, from which a
50 projectile is expelled through a barrel by the force of an explosion or other
51 form of combustion.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give bracketed element 3 if the evidence raises an issue of defense of self or others.

Related Instructions

Instruction 892, Shooting at Uninhabited House or Unoccupied Motor Vehicle

Instruction 893, Shooting at Unoccupied Aircraft

AUTHORITY

Elements ▶ Pen. Code, § 246.

Aircraft Defined ▶ Veh. Code, § 247.

Camper Defined ▶ Veh. Code, § 243.

Firearm Defined ▶ Pen. Code, § 12001(b).

House Car Defined ▶ Veh. Code, § 362.

Malicious Defined ▶ Pen. Code, § 7(4); *People v. Watie* (2002) 100 Cal.App.4th 866, 879.

Motor Vehicle Defined ▶ Veh. Code, § 415.

Willful Defined ▶ Pen. Code, § 7, subd. 1; *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438.

General Intent Crime ▶ *People v. Jischke* (1996) 51 Cal.App.4th 552, 556; *People v. Cruz* (1995) 38 Cal.App.4th 427, 431–433 [intent to strike building not required].

Occupied Building ▶ *People v. Adams* (1982) 137 Cal.App.3d 346, 354–355 [attached garage].

Occupied Motor Vehicle ▶ *People v. Buttles* (1990) 223 Cal.App.3d 1631, 1638 [tractor/trailer rig being operated on a road].

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 49, pp. 672–673.

LESSER INCLUDED OFFENSES

Assault with a deadly weapon (Pen. Code, § 245) is not necessarily included in the offense of discharging a firearm at an occupied vehicle. (*In re Daniel R.* (1993) 20 Cal.App.4th 239, 244, 247.)

RELATED ISSUES

Concurrent Sentence for Firearm Possession

If a prior felon arrives at the scene already in possession of a firearm and then shoots at an inhabited dwelling, Penal Code section 654 does not preclude imposing sentences for both offenses. (*People v. Jones* (2002) 103 Cal.App.4th 1139.)

Shooting Weapon Inside Dwelling

“[T]he firing of a pistol within a dwelling house does not constitute a violation of Penal Code section 246.” (*People v. Stepney* (1981) 120 Cal.App.3d 1016, 1021 [shooting television inside dwelling].) However, shooting from “inside [an] apartment . . . in the direction of the apartment below” is a violation of section 246. (*People v. Jischke* (1996) 51 Cal.App.4th 552, 556.)

STAFF NOTES

Elements

Penal Code section 246 provides:

Any person who shall maliciously and willfully discharge a firearm at an inhabited dwelling house, occupied building, occupied motor vehicle, occupied aircraft, inhabited housecar, as defined in Section 362 of the Vehicle Code, or inhabited camper, as defined in Section 243 of the Vehicle Code, is guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for three, five, or seven years, or by imprisonment in the county jail for a term of not less than six months and not exceeding one year.

Inhabited Defined

Penal Code section 246 defines “inhabited” as follows:

As used in this section, "inhabited" means currently being used for dwelling purposes, whether occupied or not.

This definition matches the definitions used for first degree burglary and for indecent exposure in an inhabited house. Section 246 does not include language that appears in Penal Code section 459 about a house being inhabited if it's not occupied because of a natural or other disaster.

In deciding whether a violation of section 246 is an inherently dangerous felony for purposes of the second degree felony-murder rule, the court in *People v. Hansen* (1994) 9 Cal.4th 300, 310 stated [*italics in original*]:

An inhabited dwelling house is one in which persons reside . . . and where occupants “are generally *in* or *around* the premises.”

House Defined

The definition of a house as including attached structures is taken from instruction 1405, Burglary: Degrees.

People v. Adams (1982) 137 Cal.App.3d 346, 354–355 discusses what may be an occupied building:

The term “building” is a generic term meaning any edifice or structure built by man. . . . The term “building” would include such structures as outhouses, barns, [and] garages, and an occupied building includes areas controlled by the occupants, such as a garage. . . . The term “inhabited

dwelling” or “house,” in section 246 has the same meaning as it has in the section defining first degree burglary. . . . An attached garage may be an occupied building, thus susceptible to burglary.

Motor Vehicle Defined

Vehicle Code section 415 defines “motor vehicle” as follows:

- (a) A "motor vehicle" is a vehicle that is self-propelled.
- (b) "Motor vehicle" does not include a self-propelled wheelchair, invalid tricycle, or motorized quadricycle when operated by a person who, by reason of physical disability, is otherwise unable to move about as a pedestrian.

Vehicle Code section 670 defines “vehicle” as follows:

A "vehicle" is a device by which any person or property may be propelled, moved, or drawn upon a highway, excepting a device moved exclusively by human power or used exclusively upon stationary rails or tracks.

The term “vehicle” includes a wide range of vehicles used to carry passengers or property, such as a passenger vehicle (Veh. Code, § 465), motorcycle (Veh. Code, § 400), motor scooter (Veh. Code, § 407.5), bus (Veh. Code, § 233), schoolbus (Veh. Code, § 545), commercial vehicle (Veh. Code, § 260), truck tractor (Veh. Code, § 655), trailer (Veh. Code, § 630), or semitrailer (Veh. Code, § 550).

The definition of motor vehicle in the instruction is adapted from the definition of vehicle in instruction 1316, Unlawful Taking or Driving of Vehicle.

A motor vehicle includes a tractor/trailer rig, as held in *People v. Buttles* (1990) 223 Cal.App.3d 1631, 1638:

[W]e hold that when a trailer and tractor are joined for the purpose of both being moved simultaneously over the highway by the self-propulsion of the tractor portion, such tractor/trailer rig comes within the meaning of a "motor vehicle" as used in Penal Code section 246. We further hold that when such a tractor/trailer rig is operated on a highway, it is an occupied motor vehicle within the meaning of that phrase as used in Penal Code section 246.

House Car Defined

Vehicle Code section 362 provides:

A "house car" is a motor vehicle originally designed, or permanently altered, and equipped for human habitation, or to which a camper has been permanently attached. A motor vehicle to which a camper has been temporarily attached is not a house car except that, for the purposes of Division 11 (commencing with Section 21000) and Division 12 (commencing with Section 24000), a motor vehicle equipped with a camper having an axle that is designed to support a portion of the weight of the camper unit shall be considered a three-axle house car regardless of the method of attachment or manner of registration. A house car shall not be deemed to be a motortruck.

Camper Defined

Vehicle Code section 243 provides:

A "camper" is a structure designed to be mounted upon a motor vehicle and to provide facilities for human habitation or camping purposes. A camper having one axle shall not be considered a vehicle.

Aircraft Defined

Penal Code section 247 defines aircraft as follows:

As used in this section and Section 246 "aircraft" means any contrivance intended for and capable of transporting persons through the airspace.

Firearm Defined

The definition of "firearm" is borrowed from instruction 875, Assault With a Deadly Weapon or Force Likely to Produce Great Bodily Injury, which is based on Penal Code section 12001(b):

As used in this title, "firearm" means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion.

892. Shooting at Uninhabited House or Unoccupied Motor Vehicle

1 **The defendant is charged [in Count __] with shooting at an (uninhabited**
2 **house[,]/ [or] uninhabited building[,]/ [or] unoccupied motor vehicle).**

3
4 **To prove that the defendant is guilty of this crime, the People must prove**
5 **that:**

6
7 **1. The defendant willfully shot a firearm at an (uninhabited house[,]/**
8 **[or] uninhabited building[,]/ [or] unoccupied motor vehicle).**

9
10 **[AND]**

11
12 **[2. The defendant did the shooting without the owner's permission.]**

13
14 **[AND**

15
16 **3. The defendant did not act (in self-defense/ [or] in defense of**
17 **someone else).]**

18
19 **Someone commits an act *willfully* when he or she does it willingly or on**
20 **purpose. It is not required that he or she intend to break the law, hurt**
21 **someone else, or gain any advantage.**

22
23 **[A house includes any (structure/garage/office/_____ <insert other**
24 **structure>) that is attached to the house and functionally connected with it.]**

25
26 **[A *motor vehicle* includes a (passenger vehicle/motorcycle/motor**
27 **scooter/bus/school bus/commercial vehicle/truck tractor and**
28 **trailer/_____ <insert other type of motor vehicle>).]**

29
30 **[A *firearm* is any device designed to be used as a weapon, from which a**
31 **projectile is expelled through a barrel by the force of an explosion or other**
32 **form of combustion.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In light of the statutory language, and in the absence of any case law, the committee concluded that a defendant may seek to raise a reasonable doubt whether the owner consented to the shooting. If this issue was raised at trial, give bracketed element 2.

Give bracketed element 3 if the evidence raises an issue of defense of self or others.

Related Instructions

Instruction 891, Shooting at Inhabited House or Occupied Motor Vehicle

AUTHORITY

Elements ▶ Pen. Code, § 247(b).

Firearm Defined ▶ Pen. Code, § 12001(b).

Motor Vehicle Defined ▶ Veh. Code, § 415.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 49, p. 673.

STAFF NOTES

Elements

Penal Code section 247(b) provides:

(b) Any person who discharges a firearm at an unoccupied motor vehicle or an uninhabited building or dwelling house is guilty of a public offense punishable by imprisonment in the county jail for not more than one year or in the state prison. This subdivision does not apply to shooting at an abandoned vehicle, unoccupied vehicle, uninhabited building, or dwelling house with the permission of the owner.

Element 1 is supported by the first sentence of section 247(b).

Optional element 2 is supported by the second sentence of section 247(b), which excludes application when the owner consents to the shooting. This instruction assumes that if the defendant raises the issue of permission, then the People must prove beyond a reasonable doubt that the defendant did not have permission.

Motor Vehicle Defined

The definition of motor vehicle in this instruction is copied from instruction 891, Shooting at Inhabited House or Occupied Vehicle, which is adapted from the definition of vehicle in instruction 1316, Unlawful Taking or Driving of Vehicle.

Firearm Defined

The definition of “firearm” is copied from instruction 891, Shooting at Inhabited House or Occupied Vehicle, which is borrowed from instruction 875, Assault With a Deadly Weapon or Force Likely to Produce Great Bodily Injury.

Willfully

The Committee added the word “willfully” to element 1 to emphasize that a defendant must intend to shoot the firearm in order for the act to constitute a crime. (See Pen. Code, § 20 [requires union of act and intent].) The omission of “willfully” from section 247(b) appears to be a legislative oversight, in comparison to the neighboring code sections proscribing other forms of shooting. (See, e.g., Pen. Code, §§ 246.3, 246, 247(a), 12034(c) & (d).)

893. Shooting at Unoccupied Aircraft

1 **The defendant is charged [in Count __] with shooting at an unoccupied**
2 **aircraft.**

3
4 **To prove that the defendant is guilty of this crime, the People must prove**
5 **that:**

6
7 **1. The defendant willfully and maliciously shot a firearm.**

8
9 **[AND]**

10
11 **2. The defendant shot the firearm at an unoccupied aircraft.**

12
13 **[AND]**

14
15 **3. The defendant did not act (in self-defense/ [or] in defense of**
16 **someone else).]**

17
18 **Someone commits an act *willfully* when he or she does it willingly or on**
19 **purpose. It is not required that he or she intend to break the law, hurt**
20 **someone else, or gain any advantage.**

21
22 **Someone acts *maliciously* when he or she intentionally does a wrongful act or**
23 **when he or she acts with the intent to disturb, defraud, annoy, or injure**
24 **someone else.**

25
26 **[An *aircraft* is an airplane or other craft intended for and capable of**
27 **transporting persons through the air.]**

28
29 **[A *firearm* is any device designed to be used as a weapon, from which a**
30 **projectile is expelled through a barrel by the force of an explosion or other**
31 **form of combustion.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give bracketed element 3 if the evidence raises an issue of defense of self or others.

Related Instructions

Instruction 891, Shooting at Inhabited House or Occupied Motor Vehicle

Instruction 892, Shooting at Uninhabited House or Unoccupied Motor Vehicle

AUTHORITY

Elements ▶ Pen. Code, § 247(a).

Firearm Defined ▶ Pen. Code, § 12001(b).

Malicious Defined ▶ Pen. Code, § 7(4).

Aircraft Defined ▶ Pen. Code, § 247.

Willful Defined ▶ Pen. Code, § 7, subd. 1; *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438 [in context of Pen. Code, § 246].

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 51, p. 674.

RELATED ISSUES

Laser

Willfully and maliciously discharging a laser at an occupied aircraft that is in motion or flight is a separate crime. (See Pen. Code, § 247.5.) It is also a crime to willfully shine a light or other bright device at an aircraft with the intent to interfere with the aircraft's operation. (See Pen. Code, § 248.)

STAFF NOTES

Elements

Penal Code section 247(a) provides:

(a) Any person who willfully and maliciously discharges a firearm at an unoccupied aircraft is guilty of a felony.

Aircraft Defined

Penal Code section 247 defines aircraft as follows:

As used in this section and Section 246 “aircraft” means any contrivance intended for and capable of transporting persons through the airspace.

Firearm Defined

The definition of “firearm” is borrowed from instruction 875, Assault With a Deadly Weapon or Force Likely to Produce Great Bodily Injury, which is based on Penal Code section 12001(b):

As used in this title, “firearm” means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion.

894. Shooting From Motor Vehicle

1 **The defendant is charged [in Count __] with shooting from a motor vehicle**
2 **[at another person].**

3
4 **To prove that the defendant is guilty of this crime, the People must prove**
5 **that:**

6
7 **1. The defendant willfully and maliciously shot a firearm from a**
8 **motor vehicle.**

9
10 **[AND]**

11
12 **[2. The defendant shot the firearm at another person who was not in a**
13 **motor vehicle.]**

14
15 **[AND**

16
17 **3. The defendant did not act (in self-defense/ [or] in defense of**
18 **someone else).]**

19
20 **Someone commits an act *willfully* when he or she does it willingly or on**
21 **purpose. It is not required that he or she intend to break the law, hurt**
22 **someone else, or gain any advantage.**

23
24 **Someone acts *maliciously* when he or she intentionally does a wrongful act or**
25 **when he or she acts with the intent to disturb, defraud, annoy, or injure**
26 **someone else.**

27
28 **[A *motor vehicle* includes a (passenger vehicle/motorcycle/motor**
29 **scooter/bus/school bus/commercial vehicle/truck tractor and**
30 **trailer/_____ <insert other type of motor vehicle>).]**

31
32 **[A *firearm* is any device designed to be used as a weapon, from which a**
33 **projectile is expelled through a barrel by the force of an explosion or other**
34 **form of combustion.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the bracketed phrase “at another person” in the first sentence plus bracketed element 2 if the defendant is charged with shooting at someone who was not in a motor vehicle. (See Pen. Code, § 12034(c).) If the defendant is only charged with shooting from a motor vehicle (see Pen. Code, § 12034(d)), give element 1 but not element 2.

Give bracketed element 3 if the evidence raises an issue of defense of self or others.

Related Instructions

Instruction 895, Permitting Someone to Shoot From Vehicle

AUTHORITY

Elements ▶ Pen. Code, § 12034(c) & (d).

Firearm Defined ▶ Pen. Code, § 12001(b).

Malicious Defined ▶ Pen. Code, § 7(4).

Willful Defined ▶ Pen. Code, § 7, subd. 1; *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438 [in context of Pen. Code, § 246].

General Intent Crime ▶ *People v. Laster* (1997) 52 Cal.App.4th 1450, 1468 [dictum].

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 50, p. 673.

RELATED ISSUES

Shooting at Animal

It is a separate crime to shoot from a motor vehicle at any game bird or mammal. (See Fish & G. Code, § 3002.)

STAFF NOTES

Elements

Penal Code section 12034(c) and (d) provides:

(c) Any person who willfully and maliciously discharges a firearm from a motor vehicle at another person other than an occupant of a motor vehicle is guilty of a felony punishable by imprisonment in state prison for three, five, or seven years.

(d) Except as provided in Section 3002 of the Fish and Game Code, any person who willfully and maliciously discharges a firearm from a motor vehicle is guilty of a public offense punishable by imprisonment in the county jail for not more than one year or in the state prison.

General Intent

The court in *People v. Laster* (1997) 52 Cal.App.4th 1450, 1468 summarized the intent element for Penal Code section 12034(d) [dictum]:

The offense of discharging a firearm from a motor vehicle (Pen. Code, § 12034, subd. (d)) likewise is committed by doing the proscribed act; there is no statutory requirement that the defendant intend to bring about any particular result. It is manifestly a general intent crime.

Motor Vehicle Defined

The definition of motor vehicle in this instruction is copied from instruction 891, Shooting at Inhabited House or Occupied Vehicle, which is adapted from the definition of vehicle in instruction 1316, Unlawful Taking or Driving of Vehicle.

Firearm Defined

The definition of “firearm” is borrowed from instruction 875, Assault With a Deadly Weapon or Force Likely to Produce Great Bodily Injury, which is based on Penal Code section 12001(b):

As used in this title, “firearm” means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion.

895. Permitting Someone to Shoot From Vehicle

1 **The defendant is charged [in Count __] with permitting someone to shoot**
2 **from a vehicle.**

3
4 **To prove that the defendant is guilty of this crime, the People must prove**
5 **that:**

6
7 **1. The defendant was the (driver/ [or] owner) of a vehicle.**

8
9 **2. The defendant knowingly permitted someone to shoot a firearm**
10 **from the vehicle.**

11
12 **AND**

13
14 **3. The other person shot the firearm from the vehicle.**

15
16 **[A vehicle owner who permits someone else to shoot a firearm from the**
17 **vehicle is guilty even if the owner is not in the vehicle when the shooting**
18 **happens.]**

19
20 **[A *vehicle* is a device by which people or things are moved on a highway. A**
21 **vehicle does not include a device that is moved only by human power or used**
22 **only on stationary rails or tracks.]**

23
24 **[A *firearm* is any device designed to be used as a weapon, from which a**
25 **projectile is expelled through a barrel by the force of an explosion or other**
26 **form of combustion.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Related Instructions

Instruction 894, Shooting From Motor Vehicle

AUTHORITY

Elements ▶ Pen. Code, § 12034(b).

Firearm Defined ▶ Pen. Code, § 12001(b).

General Intent Crime ▶ *People v. Laster* (1997) 52 Cal.App.4th 1450, 1468.

Vehicle Defined ▶ Veh. Code, § 670.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person,
§ 50, p. 673.

STAFF NOTES

Elements

Penal Code section 12034(b) provides:

(b) Any driver or owner of any vehicle, whether or not the owner of the vehicle is occupying the vehicle, who knowingly permits any other person to discharge any firearm from the vehicle is punishable by imprisonment in the county jail for not more than one year or in state prison for 16 months or two or three years.

General Intent

The court in *People v. Laster* (1997) 52 Cal.App.4th 1450, 1468 explained the mens rea for Penal Code section 12034(b):

The offense of permitting another to discharge a firearm from a vehicle (Pen. Code, § 12034, subd. (b)) likewise is committed merely by doing the proscribed act. This follows from the statute's use of the term "knowingly." While the defendant must know someone else is discharging a firearm from a vehicle, there is no requirement that the defendant must intend the discharge. [¶] Defendants argue that "permitting" the discharge implies intending the discharge. However, one may knowingly assist another to commit a crime, yet lack a specific intent that the crime be committed (*People v. Beeman, supra*, 35 Cal.3d at pp. 558-559); a fortiori, one may knowingly permit another to discharge a firearm, yet lack a specific intent that the firearm be discharged.

Vehicle Defined

Vehicle Code section 670 defines "vehicle" as follows:

A "vehicle" is a device by which any person or property may be propelled, moved, or drawn upon a highway, excepting a device moved exclusively by human power or used exclusively upon stationary rails or tracks.

The term "vehicle" includes a wide range of vehicles used to carry passengers or property, such as a passenger vehicle (Veh. Code, § 465), motorcycle (Veh. Code, § 400), motor scooter (Veh. Code, § 407.5), bus (Veh. Code, § 233), schoolbus (Veh. Code, § 545), commercial vehicle (Veh. Code, § 260), truck tractor (Veh. Code, § 655), trailer (Veh. Code, § 630), or semitrailer (Veh. Code, § 550).

Firearm Defined

The definition of “firearm” is borrowed from instruction 875, Assault With a Deadly Weapon or Force Likely to Produce Great Bodily Injury, which is based on Penal Code section 12001(b):

As used in this title, “firearm” means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion.

896. Brandishing Firearm in Presence of Occupant of Motor Vehicle

1 **The defendant is charged [in Count __] with brandishing a firearm in the**
2 **presence of someone in a motor vehicle.**

3
4 **To prove that the defendant is guilty of this crime, the People must prove**
5 **that:**

- 6
7 **1. The defendant drew or exhibited a firearm in the presence of**
8 **someone who was in a motor vehicle that was proceeding on a**
9 **public street or highway.**

10
11 **[AND]**

- 12
13 **2. The defendant drew or exhibited the firearm against the other**
14 **person in a threatening manner that would cause a reasonable**
15 **person to fear bodily harm.**

16
17 **[AND]**

- 18
19 **3. The defendant did not act (in self-defense/ [or] in defense of**
20 **someone else).]**

21
22 **[A *motor vehicle* includes a (passenger vehicle/motorcycle/motor**
23 **scooter/bus/school bus/commercial vehicle/truck tractor and**
24 **trailer/_____ <insert other type of motor vehicle>).]**

25
26 **[A motor vehicle is *proceeding* on a public street or highway if it is moving on**
27 **a street or highway with its engine running and propelling the vehicle.]**

28
29 **[A *firearm* is any device designed to be used as a weapon, from which a**
30 **projectile is expelled through a barrel by the force of an explosion or other**
31 **form of combustion.]**

32
33 **[It is not required that the firearm be loaded.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give bracketed element 3 if the evidence raises an issue of defense of self or others.

Give the bracketed paragraph about the lack of any requirement that the firearm be loaded if there is an issue about whether the firearm was loaded. (See Pen. Code, § 417.3.)

Related Instructions

For misdemeanor brandishing instructions, see Instructions ____.

AUTHORITY

Elements ▶ Pen. Code, § 417.3; *People v. Lara* (1996) 43 Cal.App.4th 1560, 1565–1566 [brandishing must be directed against occupant of vehicle].

Firearm Defined ▶ Pen. Code, § 12001(b).

Motor Vehicle Defined ▶ Veh. Code, §§ 415, 670.

Proceeding Defined ▶ *People v. Howard* (2002) 100 Cal.App.4th 94, 97.

Victim's Awareness of Firearm Not a Required Element ▶ *People v. McKinzie* (1986) 179 Cal.3d 789, 794 [in context of misdemeanor brandishing under Pen. Code, § 417(a)].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 5, pp. 503–505.

LESSER INCLUDED OFFENSES

Brandishing a Firearm ▶ Pen. Code, § 417.3; *People v. Howard* (2002) 100 Cal.App.4th 94, 99.

STAFF NOTES

Elements

Penal Code section 417.3 provides:

Every person who, except in self-defense, in the presence of any other person who is an occupant of a motor vehicle proceeding on a public street or highway, draws or exhibits any firearm, whether loaded or unloaded, in a threatening manner against another person in such a way as to cause a reasonable person apprehension or fear of bodily harm is guilty of a felony punishable by imprisonment in the state prison for 16 months or two or three years or by imprisonment for 16 months or two or three years and a three thousand dollar (\$3,000) fine.

Nothing in this section shall preclude or prohibit prosecution under any other statute.

The brandishing must be directed against an occupant of a motor vehicle, as held in *People v. Lara* (1996) 43 Cal.App.4th 1560, 1565–1566:

It defies reason to conclude that the Legislature did not intend to require that the person who is placed in fear by the brandishing actually be the occupant of a vehicle. Section 417.3 defines a more restrictive standard of conduct than that required for simple brandishing (section 417, subdivision (a)(2))--i.e., threatening behavior which, in fact, causes fear or apprehension of harm. It seems illogical to elevate this more dangerous act to a felony simply because an occupied vehicle happens by. The obvious purpose of section 417.3 is to deter, and/or to punish more severely, substantially more dangerous conduct--threats to persons *inside* vehicles, which threats may well result in erratic driving endangering the safety of the innocent driving and pedestrian public.

Motor Vehicle Defined

The definition of motor vehicle in this instruction is copied from instruction 891, Shooting at Inhabited House or Occupied Vehicle, which is adapted from the definition of vehicle in instruction 1316, Unlawful Taking or Driving of Vehicle.

Firearm Defined

The definition of “firearm” is borrowed from instruction 875, Assault With a Deadly Weapon or Force Likely to Produce Great Bodily Injury, which is based on Penal Code section 12001(b):

As used in this title, “firearm” means any device, designed to be used as a weapon, from which is expelled through a barrel

a projectile by the force of any explosion or other form of combustion.

Proceeding Defined

The meaning of “proceeding” was discussed in *People v. Howard* (2002) __ Cal.App.4th __:

The ordinary meaning of the word “proceeding” in this context is to be in movement, and the plain meaning of the phrase “motor vehicle proceeding on a public street or highway” is that the vehicle is moving on a street or highway with its engine running and propelling the vehicle. A stalled and inoperative vehicle stopped on the side of the road is not “proceeding on a public street or highway.” . . . A vehicle is not “proceeding on a public street or highway” merely because a driver retains physical control after the vehicle has stalled and stopped.

897. Brandishing Firearm in Presence of Peace Officer

1 **The defendant is charged [in Count __] with brandishing a firearm in the**
2 **presence of a peace officer.**

3
4 **To prove that the defendant is guilty of this crime, the People must prove**
5 **that:**

- 6
7 **1. The defendant drew or exhibited a firearm in the immediate**
8 **presence of a peace officer.**
9
10 **2. The defendant drew or exhibited the firearm in a rude, angry, or**
11 **threatening manner.**
12
13 **3. When the defendant acted, the officer was lawfully performing**
14 **(his/her) duties.**

15
16 **AND**

- 17
18 **4. When the defendant acted, (he/she) knew, or reasonably should**
19 **have known, from the person's uniform or other identifying**
20 **action[s] that the person was a peace officer who was performing**
21 **(his/her) duties.**

22
23 **A *firearm* is any device designed to be used as a weapon, from which a**
24 **projectile is expelled through a barrel by the force of an explosion or other**
25 **form of combustion.**

26
27 **[It is not required that the firearm be loaded.]**

28
29 **[A sworn member of _____ <insert name of agency that employs peace**
30 **officer>, authorized by _____ <insert appropriate section from Pen. Code,**
31 **§ 830 et seq.> to _____ <describe statutory authority>, is a *peace officer*.]**

32
33 **[The duties of a _____ <insert title of peace officer specified in Pen. Code,**
34 **§ 830 et seq.> include _____ <insert job duties>.]**

35
36 **[A peace officer is not lawfully performing his or her duties if he or she is**
37 **(unlawfully arresting or detaining someone/ [or] using unreasonable or**
38 **excessive force when (making/attempting to make) an otherwise lawful arrest**
39 **or detention).] <Give one or more of the following bracketed paragraphs defining**

lawfulness of officer's conduct if these instructions are not already given to the jury in the instructions for a greater offense. If the instructions have already been given, use the first bracketed paragraph below.>

<Instruction Already Given>

[Instruction _____<insert instruction number> explains when an officer is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force when (making/attempting to make) an otherwise lawful arrest or detention).]

<A. Unlawful Detention>

[A peace officer may legally detain someone if:

1. He or she knows specific facts that lead him or her to suspect that the person to be detained has been, is, or is about to be involved in activity relating to crime.

AND

2. A reasonable officer who knew the same facts would have the same suspicion.

Any other detention is unlawful.

In deciding whether the detention was unlawful, consider evidence of the officer's training and experience and all the circumstances known by the officer when he or she detained the person.]

<B. Unlawful Arrest>

[A peace officer may legally arrest someone [either] (on the basis of an arrest warrant/ [or] if he or she has probable cause to make the arrest).

Any other arrest is unlawful.

An officer has *probable cause* to arrest when he or she knows facts that would lead a person of ordinary care and prudence to honestly and strongly suspect that the person to be arrested is guilty of a crime.

[In order for an officer to lawfully arrest someone without a warrant for a misdemeanor or infraction, the officer must have probable cause to believe that the person to be arrested committed a misdemeanor or infraction in the officer's presence.]

83 **[[On the other hand,] (In/in) order for an officer to lawfully arrest someone**
84 **for a (felony/ [or] _____ <insert misdemeanor not requiring commission in**
85 **officer's presence; see Bench Notes>) without a warrant, that officer must have**
86 **probable cause to believe the person to be arrested committed a (felony/ [or]**
87 **_____ <insert misdemeanor not requiring commission in officer's presence;**
88 **see Bench Notes>). However, it is not required that the offense be committed**
89 **in the officer's presence.]**

90
91 _____ *<insert crime that was basis for arrest>* **is a**
92 **(felony/misdemeanor/infracton).**

93
94 **[In order for an officer to enter a home without a warrant to arrest someone:**

- 95
96 **1. The officer must have probable cause to believe that the person to be**
97 **arrested committed a crime.**

98
99 **AND**

- 100
101 **2. Exigent circumstances require the officer to enter the home without a**
102 **warrant.**

103
104 **The term *exigent circumstances* describes an emergency situation that**
105 **requires swift action to prevent (1) imminent danger to life or serious damage**
106 **to property, or (2) the imminent escape of a suspect or destruction of**
107 **evidence.]**

108
109 **[The officer must tell that person that the officer intends to arrest him or her,**
110 **why the arrest is being made, and the authority for the arrest.] [The officer**
111 **does not have to tell the arrested person these things if the officer has**
112 **probable cause to believe that the person is committing or attempting to**
113 **commit a crime, is fleeing after having committed a crime, or has escaped**
114 **from custody.] [The officer must also tell the arrested person the offense for**
115 **which (he/she) is being arrested if (he/she) asks for that information.]]**

116
117 *<C. Use of Force>*

118 **[Special rules control the use of force.**

119
120 **A peace officer may use reasonable force to arrest or detain someone, to**
121 **prevent escape, to overcome resistance, or in self-defense.**

122
123 **If a person knows, or reasonably should know, that a peace officer is**
124 **arresting or detaining him or her, the person must not use force or any**
125 **weapon to resist an officer's use of reasonable force.**

126
127 **If a peace officer uses unreasonable or excessive force while**
128 **(arresting/attempting to arrest/detaining/attempting to detain) a person, that**
129 **person may lawfully use reasonable force to defend (himself/herself).**
130

131 **A person being arrested uses reasonable force when he or she uses that**
132 **degree of force that he or she actually believes is reasonably necessary to**
133 **protect himself or herself from the officer's use of unreasonable or excessive**
134 **force. The force must be no more than a reasonable person in the same**
135 **situation would believe is necessary for his or her protection.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court also has a **sua sponte** duty to instruct on defendant's reliance on self-defense. (See *People v. White* (1980) 101 Cal.App.3d 161, 167–168.) On request, the court must instruct that the People have the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145.) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47.)

Give the bracketed paragraph about the lack of any requirement that the firearm be loaded if there is an issue about whether the firearm was loaded.

Give the appropriate bracketed paragraphs on the lawfulness of the officer's conduct and use of force if those instructions have not already been given in the instructions for a greater offense. If the instructions have been given, use the bracketed paragraph directing the jury to that other instruction.

In the paragraphs headed "A. Unlawful Detention," if the case presents a factual issue of whether the defendant was in fact detained, the court should provide the jury with a definition of when a person is legally detained.

In the paragraphs headed "B. Unlawful Arrest," several options are given depending on the crime for which the arrest was made. The general rule is that an

officer may not make an arrest for a misdemeanor or infraction unless the offense was committed in the officer's presence. (See Pen. Code, § 836(a)(1).) Statutes provide exceptions to this requirement for some misdemeanors. (See, e.g., Pen. Code, § 836(c) [violation of domestic violence protective or restraining order]; Veh. Code, § 40300.5 [driving under the influence plus traffic accident or other specified circumstance].) If the defense does not rely on the statutory limitation, neither bracketed paragraph regarding arrest without a warrant need be given. If the only offense on which the officer relied in making the arrest is a nonexempted misdemeanor or an infraction, give the first bracketed paragraph beginning "In order for an officer to lawfully arrest someone without a warrant" If the officer allegedly made the arrest for both a misdemeanor or infraction *and* a felony or exempted misdemeanor, give both bracketed paragraphs.

In cases involving multiple crimes, use the paragraph that specifies the crime that was the basis for the arrest as many times as needed to describe each underlying crime separately.

Give the bracketed language about entering a home under exigent circumstances if the arrest took place in the defendant's home. (*People v. Wilkins* (1993) 14 Cal.App.4th 761, 777.)

The jury must determine whether the victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445.) The court may instruct the jury on the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). (*Ibid.*) However, the court may not instruct the jury that the victim was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). (*Ibid.*)

Related Instructions

For misdemeanor brandishing instructions, see Instructions ____.

AUTHORITY

Elements ▶ Pen. Code, § 417(c) & (e).

Firearm Defined ▶ Pen. Code, § 12001(b); see *In re Jose A.* (1992) 5 Cal.App.4th 697, 702 [pellet gun not a "firearm" within meaning of Pen. Code, § 417(a)].

Peace Officer Defined ▶ Pen. Code, § 830 et seq.

Victim's Awareness of Firearm Not a Required Element ▶ *People v. McKinzie* (1986) 179 Cal.3d 789, 794 [in context of misdemeanor brandishing under Pen. Code, § 417(a)].

Weapon Need Not Be Pointed Directly at Victim ▶ *People v. Sanders* (1995) 11 Cal.4th 475, 542 [in context of Pen. Code, § 417(a)].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 6, 7, pp. 505–507.

LESSER INCLUDED OFFENSES

Brandishing a Firearm ▶ Pen. Code, § 417(a)(2).

RELATED ISSUES

Infliction of Serious Bodily Injury

It is a separate offense to intentionally inflict serious bodily injury while drawing or exhibiting a firearm in the presence of a peace officer. (See Pen. Code, § 417.6(a); see also Pen. Code, § 417.6(b) [defining “serious bodily injury”].)

Multiple Peace Officers

A “single act of exhibiting a firearm in the presence of a peace officer . . . cannot be punished as many times as there are peace officers observing the act. . . . [T]he multiple-victim exception [under *Neal v. State of California* (1960) 55 Cal.2d 11, 20–21 for acts of violence against multiple victims] is just that, a multiple-victim exception, not a multiple-observer exception.” (*People v. Hall* (2000) 83 Cal.App.4th 1084, 1095–1096.)

Sensory Impairment Defense

A defendant with visual or hearing impairments may assert the impairments in defense to a charge of exhibiting a firearm in the presence of a peace officer. (*People v. Matthews* (1994) 25 Cal.App.4th 89, 99 [error to refuse an instruction using tort standard of a reasonable person with similar physical disabilities].)

Substantial Evidence

A defendant “having assumed what can only be described as a classical gunfighter’s stance, coupled with his refusal to turn over his weapon to the officer at the latter’s request and his statement that if the officer wanted the gun he could come and get it” constitutes substantial evidence supporting a conviction under Penal Code section 417(c). (*People v. Mercer* (1980) 113 Cal.App.3d 803, 806.)

STAFF NOTES

Elements

Penal Code section 417(c) provides:

(c) Every person who, in the immediate presence of a peace officer, draws or exhibits any firearm, whether loaded or unloaded, in a rude, angry, or threatening manner, and who knows, or reasonably should know, by the officer's uniformed appearance or other action of identification by the officer, that he or she is a peace officer engaged in the performance of his or her duties, and that peace officer is engaged in the performance of his or her duties, shall be punished by imprisonment in a county jail for not less than nine months and not to exceed one year, or in the state prison.

Peace Officer Defined

Penal Code section 417(e) defines “peace officer” as follows:

(e) As used in this section, "peace officer" means any person designated as a peace officer pursuant to Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2.

The definitions of a “sworn officer” and the “duties of a peace officer” are borrowed from instruction 876, Assault With a Deadly Weapon or Force Likely to Produce Great Bodily Injury on Firefighter or Peace Officer.

Firearm Defined

The definition of “firearm” is borrowed from instruction 875, Assault With a Deadly Weapon or Force Likely to Produce Great Bodily Injury, which is based on Penal Code section 12001(b):

As used in this title, “firearm” means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion.

898. Brandishing Firearm or Deadly Weapon to Resist Arrest

1 **The defendant is charged [in Count __] with brandishing a (firearm/deadly**
2 **weapon) to resist arrest or detention.**

3
4 **To prove that the defendant is guilty of this crime, the People must prove**
5 **that:**

6
7 **1. The defendant drew or exhibited a (firearm/deadly weapon).**

8
9 **AND**

10
11 **2. When the defendant drew or exhibited the (firearm/deadly**
12 **weapon), (he/she) intended to resist arrest or to prevent a peace**
13 **officer from arresting or detaining (him/her/someone else).**

14
15 **[A *firearm* is any device designed to be used as a weapon, from which a**
16 **projectile is expelled through a barrel by the force of an explosion or other**
17 **form of combustion.]**

18
19 **[It is not required that the firearm be loaded.]**

20
21 **[A *deadly weapon* is any object, instrument, or weapon that is used in a way**
22 **capable of causing and likely to cause death or great bodily injury.] [*Great***
23 ***bodily injury* means significant or substantial physical injury.]**

24
25 **[A sworn member of _____ <insert name of agency that employs peace**
26 **officer >, authorized by _____ <insert appropriate section from Pen.**
27 **Code, § 830 et seq.> to _____ <describe statutory authority>, is a peace**
28 **officer.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the bracketed definition of “firearm” or “deadly weapon” on request if there is an issue whether the defendant brandished a firearm or deadly weapon. (See *People v. Pruett* (1997) 57 Cal.App.4th 77, 86 [“deadly weapon” not necessarily a

technical term requiring definition].) “Deadly weapon” should be defined when the instrument used is neither a weapon in the strict sense of the word nor “dangerous or deadly” to others in the ordinary use for which it is designed. (See *People v. Graham* (1969) 71 Cal.2d 303, 328–329 [“dangerous or deadly weapon” for first degree robbery under former Pen. Code, § 211a].)

Give the bracketed paragraph about the lack of any requirement that the firearm be loaded if there is an issue about whether a firearm was loaded.

The jury must determine whether the victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445.) The court may instruct the jury on the appropriate definition of “peace officer” from the statute (e.g., “a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers”). (*Ibid.*) However, the court may not instruct the jury that the victim was a peace officer as a matter of law (e.g., “Officer Reed was a peace officer”). (*Ibid.*)

Related Instructions

For an instruction regarding simple brandishing, see Instruction 897, Brandishing Firearm in Presence of Peace Officer. See also Instruction 900, Taking Firearm or Weapon While Resisting Officer.

AUTHORITY

Elements ▶ Pen. Code, § 417.8.

Firearm Defined ▶ Pen. Code, § 12001(b); see *In re Jose A.* (1992) 5 Cal.App.4th 697, 702 [pellet gun not a “firearm” within meaning of Pen. Code, § 417(a)].

Peace Officer Defined ▶ Pen. Code, § 830 et seq.

Deadly Weapon Defined ▶ *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029; see, e.g., *People v. Simons* (1996) 42 Cal.App.4th 1100, 1107 [screwdriver was capable of being used as a deadly weapon and defendant intended to use it as one if need be]; *People v. Henderson* (1999) 76 Cal.App.4th 453, 469–470 [pit bulls were deadly weapons under the circumstances].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 6, 7, pp. 505–507.

LESSER INCLUDED OFFENSES

Resisting arrest by a peace officer engaged in the performance of his or her duties in violation of Penal Code section 148(a) is not a lesser included offense of Penal Code section 417.8. (*People v. Simons* (1996) 42 Cal.App.4th 1100, 1108–1110.) Brandishing a deadly weapon in a rude, angry, or threatening manner in violation

of Penal Code section 417(a)(1) is also not a lesser included offense of section 417.8. (*People v. Pruett* (1997) 57 Cal.App.4th 77, 88.)

RELATED ISSUES

Infliction of Serious Bodily Injury

It is a separate offense to intentionally inflict serious bodily injury while drawing or exhibiting a firearm or other deadly weapon to resist or prevent arrest or detention by a peace officer. (See Pen. Code, § 417.6(a); see also Pen. Code, § 417.6(b) [defining “serious bodily injury”].)

Multiple Peace Officers

A “single act of exhibiting a firearm in the presence of a peace officer . . . cannot be punished as many times as there are peace officers observing the act. . . . [T]he multiple-victim exception [under *Neal v. State of California* (1960) 55 Cal.2d 11, 20–21 for acts of violence against multiple victims] is just that, a multiple-victim exception, not a multiple-observer exception.” (See *People v. Hall* (2000) 83 Cal.App.4th 1084, 1095–1096 [in context of brandishing in violation of Pen. Code, § 417].)

Sensory Impairment Defense

A defendant with visual or hearing impairments may assert the impairments in defense to a charge of exhibiting a firearm in the presence of a peace officer. (See *People v. Matthews* (1994) 25 Cal.App.4th 89, 99 [error to refuse an instruction using tort standard of a reasonable person with similar physical disabilities].)

STAFF NOTES

Elements

Penal Code section 417.8 provides:

Every person who draws or exhibits any firearm, whether loaded or unloaded, or other deadly weapon, with the intent to resist or prevent the arrest or detention of himself or another by a peace officer shall be imprisoned in the state prison for two, three, or four years.

Peace Officer Defined

Penal Code section 417(e) defines “peace officer” as follows:

(e) As used in this section, "peace officer" means any person designated as a peace officer pursuant to Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2.

The definition of a “sworn officer” is borrowed from instruction 876, Assault With a Deadly Weapon or Force Likely to Produce Great Bodily Injury on Firefighter or Peace Officer.

Firearm Defined

The definition of “firearm” is borrowed from instruction 875, Assault With a Deadly Weapon or Force Likely to Produce Great Bodily Injury, which is based on Penal Code section 12001(b):

As used in this title, “firearm” means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion.

Deadly Weapon Defined

Deadly weapon is defined in *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 for purposes of Penal Code section 245(a)(1):

As used in section 245, subdivision (a)(1), a “deadly weapon” is “any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury. (Citations omitted)

A screwdriver can be a deadly weapon, as held in *People v. Simons* (1996) 42 Cal.App.4th 1100, 1107:

[T]he screwdriver exhibited by defendant here, while not an inherently deadly weapon, was a deadly weapon on this particular occasion. The evidence clearly demonstrated that the screwdriver was capable of being used as a deadly weapon and that defendant intended to use it as such if the circumstances required.

Cases have recognized two classes of dangerous or deadly weapons, as summarized in *People v. Raleigh* (1932) 128 Cal.App. 105, 108–109:

[W]e are of the opinion that a distinction should be made between two classes of “dangerous or deadly weapons”. There are, first, those instrumentalities which are weapons in the strict sense of the word, and, second, those instrumentalities which are not weapons in the strict sense of the word, but which may be used as such. . . . When it appears . . . that an instrumentality other than one falling within the first class is capable of being used in a “dangerous or deadly” manner, and it may be fairly inferred from the evidence that its possessor intended on a particular occasion to use it as a weapon should the circumstances require, we believe that its character as a “dangerous or deadly weapon” may be thus established, at least for the purposes of that occasion.

But the *Raleigh* intent test need not be applied to section 417.8, as discussed in *People v. Pruett* (1997) 57 Cal.App.4th 77, 86:

To find otherwise would be tantamount to rephrasing section 417.8 to make it a crime for a defendant to draw or exhibit “a deadly instrument with the intent to use it as a weapon with the intent to prevent the arrest or detention of himself or another by a peace officer.” . . . [A] jury’s determination that a defendant employed a deadly instrument (in this case, a knife) with the intention of preventing his arrest or detention would necessarily include a finding that the deadly instrument was used as a weapon—or that the defendant intended to use it as a weapon—as the term “weapon is used in common parlance.

Thus, *Pruett* continues:

[T]he term “deadly weapon,” as used in section 417.8, is not necessarily a technical one, requiring definition. Where, as here, the instrument employed [a folding knife] is one [that] lay people could readily determine to be capable of causing death, no special definition of “deadly” is required.

Because the use of such an instrument with the intent to resist arrest or detention necessarily encompasses its use or intended use as a weapon, no definition of “weapon” or “deadly weapon” is required.

900. Taking Firearm or Weapon While Resisting Peace Officer

1 **The defendant is charged [in Count __] with taking a (firearm/weapon) from**
2 **a peace officer while (resisting[,]/obstructing[,]/ [or] delaying) the officer in**
3 **performing [or attempting to perform] (his/her) duties.**

4
5 **To prove that the defendant is guilty of this crime, the People must prove**
6 **that:**

- 7
- 8 **1. _____ <insert officer's name, excluding title> was a peace**
9 **officer lawfully performing [or attempting to perform] (his/her)**
10 **duties as a peace officer.**
 - 11
 - 12 **2. The defendant willfully (resisted[,]/obstructed[,]/ [or] delayed)**
13 **_____ <insert officer's name, excluding title> in the**
14 **performance of [or attempt to perform] those duties.**
 - 15
 - 16 **3. When the defendant acted, (he/she) knew, or reasonably should**
17 **have known, that _____ <insert officer's name, excluding title>**
18 **was a peace officer performing [or attempting to perform] (his/her)**
19 **duties.**

20
21 **[AND]**

- 22
- 23 **4. While the defendant (resisted[,]/obstructed[,]/ [or] delayed)**
24 **_____ <insert officer's name, excluding title>, the defendant**
25 **took a (firearm/weapon) from _____'s <insert officer's name,**
26 **excluding title> person [or immediate presence].**

27
28 **[AND]**

- 29
- 30 **5. The defendant did not act (in self-defense/ [or] in defense of**
31 **someone else).]**

32
33 **Someone commits an act *willfully* when he or she does it willingly or on**
34 **purpose. It is not required that he or she intend to break the law, hurt**
35 **someone else, or gain any advantage.**

[A sworn member of _____ <insert name of agency that employs peace officer>, authorized by _____ <insert appropriate section from Pen. Code, § 830 et seq.> to _____ <describe statutory authority>, is a peace officer.]

[The duties of a _____ <insert title of peace officer specified in Pen. Code, § 830 et seq.> include _____ <insert job duties>.]

A firearm is any device designed to be used as a weapon, from which a projectile is expelled through a barrel by the force of an explosion or other form of combustion.

A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force when (making/attempting to make) an otherwise lawful arrest or detention). <Give one or more of the following bracketed paragraphs defining lawfulness of officer's conduct if these instructions are not already given to the jury in the instructions for a greater offense. If the instructions have already been given, use the first bracketed paragraph below.>

<Instruction Already Given>

[Instruction _____ <insert instruction number> explains when an officer is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force when (making/attempting to make) an otherwise lawful arrest or detention).

<A. Unlawful Detention>

[A peace officer may legally detain someone if:

- 1. He or she knows specific facts that lead him or her to suspect that the person to be detained has been, is, or is about to be involved in activity relating to crime.**

AND

- 2. A reasonable officer who knew the same facts would have the same suspicions.**

Any other detention is unlawful.

In deciding whether the detention was unlawful, consider evidence of the officer's training and experience and all the circumstances known by the officer when he or she detained the person.]

77 <B. Unlawful Arrest>

78 [A peace officer may legally arrest someone [either] (on the basis of an arrest
79 warrant/ [or] if he or she has probable cause to make the arrest).

80
81 Any other arrest is unlawful.

82
83 An officer has *probable cause* to arrest when he or she knows facts that would
84 lead a person of ordinary care and prudence to honestly and strongly suspect
85 that the person to be arrested is guilty of a crime.

86
87 [In order for an officer to lawfully arrest someone without a warrant for a
88 misdemeanor or infraction, the officer must have probable cause to believe
89 that the person to be arrested committed a misdemeanor or infraction in the
90 officer's presence.]

91
92 [[On the other hand,] (In/in) order for an officer to lawfully arrest someone
93 for a (felony / [or] _____ <insert misdemeanor not requiring commission
94 in officer's presence; see Bench Notes>) without a warrant, that officer must
95 have probable cause to believe the person to be arrested committed a (felony/
96 [or] _____ <insert misdemeanor not requiring commission in officer's
97 presence; see Bench Notes>). However, it is not required that the offense be
98 committed in the officer's presence.]

99
100 _____ <insert crime that was basis for arrest> is a
101 (felony/misdemeanor/infraction).

102
103 [In order for an officer to enter a home without a warrant to arrest someone:

- 104 1. The officer must have probable cause to believe that the person to be
105 arrested committed a crime.

106 AND

- 107 2. Exigent circumstances require the officer to enter the home without a
108 warrant.

109
110 The term *exigent circumstances* describes an emergency situation that
111 requires swift action to prevent (1) imminent danger to life or serious damage
112 to property, or (2) the imminent escape of a suspect or destruction of
113 evidence.]

114
115 [The officer must tell that person that the officer intends to arrest him or her,
116 why the arrest is being made, and the authority for the arrest.] [The officer

117 does not have to tell the arrested person these things if the officer has
118 probable cause to believe that the person is committing or attempting to
119 commit a crime, is fleeing after having committed a crime, or has escaped
120 from custody.] [The officer must also tell the arrested person the offense for
121 which (he/she) is being arrested if (he/she) asks for that information.]]

122
123 <C. Use of Force>

124 [Special rules control the use of force.

125
126 A peace officer may use reasonable force to arrest or detain someone, to
127 prevent escape, to overcome resistance, or in self-defense.

128
129 If a person knows, or reasonably should know, that a peace officer is
130 arresting or detaining him or her, the person must not use force or any
131 weapon to resist an officer's use of reasonable force.

132
133 If a peace officer uses unreasonable or excessive force while
134 (arresting/attempting to arrest/detaining/attempting to detain) a person, that
135 person may lawfully use reasonable force to defend (himself/herself).

136
137 A person being arrested uses reasonable force when he or she uses that
138 degree of force that he or she actually believes is reasonably necessary to
139 protect himself or herself from the officer's use of unreasonable or excessive
140 force. The force must be no more than a reasonable person in the same
141 situation would believe is necessary for his or her protection.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court also has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168; see element 5.) On request, the court must instruct that the People have the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145.) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in

which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47.)

Give the appropriate bracketed paragraphs on the lawfulness of the officer's conduct and use of force if those instructions have not already been given in the instructions for a greater offense. If the instructions have been given, use the bracketed paragraph directing the jury to that other instruction.

In the paragraphs headed “A. Unlawful Detention,” if the case presents a factual issue of whether the defendant was in fact detained, the court should provide the jury with a definition of when a person is legally detained.

In the paragraphs headed “B. Unlawful Arrest,” several options are given depending on the crime for which the arrest was made. The general rule is that an officer may not make an arrest for a misdemeanor or infraction unless the offense was committed in the officer's presence. (See Pen. Code, § 836(a)(1).) Statutes provide exceptions to this requirement for some misdemeanors. (See, e.g., Pen. Code, § 836(c) [violation of domestic violence protective or restraining order]; Veh. Code, § 40300.5 [driving under the influence plus traffic accident or other specified circumstance].) If the defense does not rely on the statutory limitation, neither bracketed paragraph regarding arrest without a warrant need be given. If the only offense on which the officer relied in making the arrest is a nonexempted misdemeanor or an infraction, give the first bracketed paragraph beginning “In order for an officer to lawfully arrest someone without a warrant . . .” If the officer allegedly made the arrest for both a misdemeanor or infraction *and* a felony or exempted misdemeanor, give both bracketed paragraphs.

In cases involving multiple crimes, use the paragraph that specifies the crime that was the basis for the arrest as many times as needed to describe each underlying crime separately.

Give the bracketed language about entering a home under exigent circumstances if an arrest took place in the defendant's home. (*People v. Wilkins* (1993) 14 Cal.App.4th 761, 777.)

The jury must determine whether the victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445.) The court may instruct the jury on the appropriate definition of “peace officer” from the statute (e.g., “a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers”). (*Ibid.*) However, the court may not instruct the jury that the victim was a peace officer as a matter of law (e.g., “Officer Reed was a peace officer”). (*Ibid.*)

Give the bracketed definition of “firearm” on request if there is an issue whether the item removed from the officer was a firearm.

Related Instructions

Instruction 901, Taking Firearm or Weapon While Resisting Public Officer

Instruction 902, Intentionally Taking or Attempting to Take Firearm From Peace Officer

Instruction 903, Intentionally Taking or Attempting to Take Firearm From Public Officer

AUTHORITY

Elements ▶ Pen. Code, § 148(b) & (c); see *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329 [elements of Pen. Code, § 148(a) offense]; *Nuno v. San Bernardino County* (1999) 58 F.Supp. 1127, 1133 [officer lawfully performing duties]; *People v. Lopez* (1986) 188 Cal.App.3d 592, 599–600 [knowledge that other person is an officer].

Firearm Defined ▶ Pen. Code, § 12001(b).

Multiple Violations ▶ Pen. Code, § 148(e).

Peace Officer Defined ▶ Pen. Code, § 830 et seq.

Unlawful Arrest or Act by Officer ▶ Pen. Code, § 148(f); *Franklin v. Riverside County* (1997) 971 F.Supp. 1332, 1335–1336 [unlawful arrest if officer uses excessive force]; *People v. Curtis* (1969) 70 Cal.2d 347, 354 [§ 148 applies only to lawful arrests]; *Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1409 [excessive force by officer not within duties].

Burden on People to Prove Arrest or Detention Lawful ▶ *People v. Castain* (1981) 122 Cal.App.3d 138, 145; *In re Joseph R.* (2000) 85 Cal.App.4th 975, 982.

Delaying Officer From Performing Duties ▶ *People v. Allen* (1980) 109 Cal.App.3d 981, 985–986, 987.

Detention ▶ *In re Tony C.* (1978) 21 Cal.3d 888, 895.

General Intent Crime ▶ *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329; *People v. Matthews* (1999) 70 Cal.App.4th 164, 175.

“Take” or “Remove” Defined ▶ *People v. Matthews* (1999) 70 Cal.App.4th 164, 173, 175.

Verbal Resistance or Obstruction ▶ *People v. Quiroga* (1993) 16 Cal.App.4th 961, 968, 970–972 [nondisclosure of identity following arrest for felony, not misdemeanor]; *People v. Green* (1997) 51 Cal.App.4th 1433, 1438 [attempt to intimidate suspected victim into denying offense].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 18–20, pp. 1103–1107.

LESSER INCLUDED OFFENSES

Attempted Removal of Firearm or Weapon ▶ Pen. Code, §§ 663, 148(b) & (c).
Misdemeanor Resisting Arrest ▶ Pen. Code, § 148(a)(1).

RELATED ISSUES

Multiple Violations

A person may be convicted of multiple violations of this section if there are multiple peace officer victims. (Pen. Code, § 148(e).) However, a person may not be convicted of both resisting an officer in violation of Penal Code section 148(a) and removing a weapon or firearm from an officer in violation of Penal Code section 148(b), (c), or (d) if the resistance and removal were committed against the same officer. (Pen. Code, § 148(e).)

Other Forms of Resistance or Interference

It is a misdemeanor under Penal Code section 148(a)(1) to willfully resist, delay, or obstruct any emergency medical technician in discharging or attempting to discharge his or her duties of employment. (See Health & Saf. Code, § 1797 [defining emergency medical technician].) It is also a misdemeanor under Penal Code section 148(a)(2) to knowingly and maliciously interrupt, disrupt, impede, or otherwise interfere with the transmission of a communication over a public safety radio frequency.

STAFF NOTES

Elements

Penal Code section 148(b)–(d) provides:

(b) Every person who, during the commission of any offense described in subdivision (a), removes or takes any weapon, other than a firearm, from the person of, or immediate presence of, a public officer or peace officer shall be punished by imprisonment in a county jail not to exceed one year or in the state prison.

(c) Every person who, during the commission of any offense described in subdivision (a), removes or takes a firearm from the person of, or immediate presence of, a public officer or peace officer shall be punished by imprisonment in the state prison.

This instruction includes blanks for the name of the officer being resisted, pursuant to a suggestion in *People v. White* (1980) 101 Cal.App.3d 161, 169, fn. 3:

Count 6 (§ 148) failed to name a specific officer as the victim. Under the circumstances of this case, the victim could have been either [officer] Gonzalez or Ciolli. The preferable practice is to allege in the information the specific officer whose lawful authority was resisted. If not so alleged, the jury must specifically be instructed as to the officer involved to assure a defendant, if convicted, that the jury has reached a unanimous verdict. Otherwise the jurors could base their conclusions on defendant's conduct towards one officer with other jurors reaching their conclusion with reference to defendant's conduct in resisting a different officer.

Misdemeanor Resisting Peace Officer

The accused must remove a weapon or firearm during the commission of misdemeanor resistance or obstruction, which is defined in Penal Code section 148(a)(1) & (2):

(a)(1) Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician, as defined in Division 2.5 (commencing with Section 1797) of the Health and Safety Code, in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in a county jail not to exceed

one year, or by both that fine and imprisonment.

(2) Except as provided by subdivision (d) of Section 653t, every person who knowingly and maliciously interrupts, disrupts, impedes, or otherwise interferes with the transmission of a communication over a public safety radio frequency shall be punished by a fine not exceeding one thousand dollars (\$1,000), imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment.

There is no duty to define “obstruct,” as stated in *People v. Roberts* (1982) 131 Cal.App.3d Supp. 1, 6:

The words used in section 148 are sufficiently definite in their terms so that a person of ordinary understanding could interpret them [citation]; accordingly, we see no error in the trial court’s failure to define the word “obstruct.”

No Application to Officer’s Criminal Act

Penal Code section 148(f) provides:

(f) This section shall not apply if the public officer, peace officer, or emergency medical technician is disarmed while engaged in a criminal act.

Peace Officer Defined

Penal Code section 417(e) defines “peace officer” as follows:

(e) As used in this section, "peace officer" means any person designated as a peace officer pursuant to Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2.

The definition of a “sworn officer” is borrowed from instruction 876, Assault With a Deadly Weapon or Force Likely to Produce Great Bodily Injury on Firefighter or Peace Officer.

Firearm Defined

The definition of “firearm” is borrowed from instruction 875, Assault With a Deadly Weapon or Force Likely to Produce Great Bodily Injury, which is based on Penal Code section 12001(b):

As used in this title, “firearm” means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion.

Lawful Detention or Arrest and Use of Force

These paragraphs are copied from instruction 859, Battery Against Peace Officer. The paragraphs incorporate the definition of “exigent circumstances” for purposes of a warrantless entry into a home. (See *People v. Wilkins* (1993) 14 Cal.App.4th 761, 777; *People v. Ramey* (1976) 16 Cal.3d 263, 276.)

One paragraph within the paragraphs on use of force regarding the duty not to resist an arrest was not included from instruction 859. That provision does not apply to a section 148 charge, as discussed in *People v. White* (1980) 101 Cal.App.3d 161, 168–169:

[T]he court erred in failing to instruct that [Penal Code] section 834a—a duty not to resist arrest—does not apply to a charge of section 148. [Citations.] As we have stated, section 148 only applies to lawful arrests. When instructed as to section 834a in a case involving a single count of section 148, or multiple counts where a different police officer is involved in the section 148 violation, the jury is given the opportunity to improperly infer defendant could be guilty of a crime upon resisting an unlawful arrest. A court should expressly limit the application of that section (§ 834a).

See also *People v. Curtis* (1969) 70 Cal.2d 347, 354:

[S]ection [148] makes it a misdemeanor to resist, delay or obstruct an officer in the discharge of “any duty of his office.” Section 148 has long been construed by the courts as applying only to lawful arrests, because “An officer is under no duty to make an unlawful arrest.” [Citations.] Even if section 834a now makes it a *citizen’s* duty not to resist an unlawful arrest, this change in the law in no way purports to include an unlawful arrest within the performance of an *officer’s* duty.

Penal Code section 834a provides:

If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest.

Single Conviction for Resistance and Removal Committed Against Same Officer

Penal Code section 148(e) provides:

(e) A person shall not be convicted of a violation of subdivision (a) in addition to a conviction of a violation of subdivision (b), (c), or (d) when the resistance, delay, or obstruction, and the removal or taking of the weapon or firearm or attempt thereof, was committed against the same public officer, peace officer, or emergency medical technician.

Multiple Officers as Victims

The last sentence of Penal Code section 148(e) provides:

A person may be convicted of multiple violations of this section if more than one public officer, peace officer, or emergency medical technician are victims.

Detention

In re Tony C. (1978) 21 Cal.3d 888, 895-896 provides the following basis for the definition of detention:

It has been said that a detention occurs if the suspect is not free to leave at will – if he is kept in the officer’s presence by physical restraint, threat of force, or assertion of authority. (citation omitted) But the definition is underinclusive: actual or threatened physical restraints are the characteristics of a full-blown arrest (Pen. Code, § 835), and an officer will frequently use more subtle methods to detain a suspect whom he wishes simply to question about possible criminal activity. The definition is also overinclusive: either through fear or respect, many persons who are not in fact under detention nevertheless do not feel free to leave at will when a uniformed police officer indicates a desire to talk with them.

A more fruitful approach focuses on the purpose of the intrusion itself . . . If the individual is stopped or detained because the officer suspects he may be personally involved in some criminal activity, his Fourth Amendment rights are implicated and he is entitled to the safeguards of the rules set forth above. But similar safeguards are not required if the officer acts for other proper reasons. Such reasons are obviously too many and varied to recite, but they may be grouped in at least two general categories: (1) the officer may wish to question the person not as a suspect but merely as a witness to

a crime, or (2) the officer may be engaged in one of ‘those innumerable miscellaneous tasks which society calls upon police to do which have nothing to do with the detection of crime’ (citation omitted), such as giving aid to persons in distress, mediating domestic quarrels, assisting the elderly or the disabled, furnishing traffic advice or directions, and generally preserving the peace and protecting persons from harm or annoyance.

Sources from Other Jurisdictions

Revised Arizona Jury Instructions, nos. 25.08, 25.08-1

Michigan Criminal Jury Instructions, nos. CJI2d 13.1, 13.2

901. Taking Firearm or Weapon While Resisting Public Officer

1 **The defendant is charged [in Count __] with taking a (firearm/weapon) from**
2 **a public officer while (resisting[,]/obstructing[,]/ [or] delaying) the officer**
3 **from performing [or attempting to perform] (his/her) duties.**

4
5 **To prove that the defendant is guilty of this crime, the People must prove**
6 **that:**

- 7
- 8 **1. _____ <insert officer's name, excluding title> was a public**
9 **officer lawfully performing [or attempting to perform] (his/her)**
10 **duties as a public officer.**
 - 11
 - 12 **2. The defendant willfully (resisted[,]/obstructed[,]/ [or] delayed)**
13 **_____ <insert officer's name, excluding title> in the**
14 **performance of [or attempt to perform] those duties.**
 - 15
 - 16 **3. When the defendant acted, (he/she) knew, or reasonably should**
17 **have known, that _____ <insert officer's name, excluding title>**
18 **was a public officer performing [or attempting to perform] (his/her)**
19 **duties.**

20
21 **[AND]**

- 22
- 23 **4. While the defendant (resisted[,]/obstructed[,]/ [or] delayed)**
24 **_____ <insert officer's name, excluding title>, the defendant**
25 **took a (firearm/weapon) from _____'s <insert officer's name,**
26 **excluding title> person [or immediate presence].**

27
28 **[AND]**

- 29
- 30 **5. The defendant did not act (in self-defense/ [or] in defense of**
31 **someone else).]**

32
33 **Someone commits an act *willfully* when he or she does it willingly or on**
34 **purpose. It is not required that he or she intend to break the law, hurt**
35 **someone else, or gain any advantage.**

36
37 **[A *firearm* is any device designed to be used as a weapon, from which a**
38 **projectile is expelled through a barrel by the force of an explosion or other**
39 **form of combustion.]**

[An officer [or employee] of _____ <insert name of state or local government agency that employs public officer > is a **public officer**.]

[The duties of a _____ <insert title of public officer> include _____ <insert job duties>.]

[A public officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force when (making/attempting to make) an otherwise lawful arrest or detention).] <Give one or more of the following bracketed paragraphs defining lawfulness of officer's conduct if these instructions are not already given to the jury in the instructions for a greater offense. If the instructions have already been given, use the first bracketed paragraph below.>

<Instruction Already Given>

[Instruction _____ <insert instruction number> explains when an officer is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force when (making/attempting to make) an otherwise lawful arrest or detention).]

<A. Unlawful Detention>

[A public officer may legally detain someone if:

1. He or she knows specific facts that lead him or her to suspect that the person to be detained has been, is, or is about to be involved in activity relating to crime.

AND

2. A reasonable officer who knew the same facts would have the same suspicions.

Any other detention is unlawful.

In deciding whether the detention was unlawful, consider evidence of the officer's training and experience and all the circumstances known by the officer when he or she detained the person.]

<B. Unlawful Arrest>

[A public officer may legally arrest someone [either] (on the basis of an arrest warrant/ [or] if he or she has probable cause to make the arrest).

Any other arrest is unlawful.

81
82 **An officer has *probable cause* to arrest when he or she knows facts that would**
83 **lead a person of ordinary care and prudence to honestly and strongly suspect**
84 **that the person to be arrested is guilty of a crime.**

85
86 **[In order for an officer to lawfully arrest someone without a warrant for a**
87 **misdemeanor or infraction, the officer must have probable cause to believe**
88 **that the person to be arrested committed a misdemeanor or infraction in the**
89 **officer's presence.]**

90
91 **[[On the other hand,] (In/in) order for an officer to lawfully arrest someone**
92 **for a (felony/ [or] _____ <insert misdemeanor not requiring commission in**
93 **officer's presence; see Bench Notes>] without a warrant, that officer must have**
94 **probable cause to believe the person to be arrested committed a (felony/ [or]**
95 **_____ <insert misdemeanor not requiring commission in officer's presence;**
96 **see Bench Notes>). However, it is not required that the offense be committed**
97 **in the officer's presence.]**

98
99 **_____ <insert crime that was basis for arrest> is a**
100 **(felony/misdemeanor/infraction).**

101
102 **[In order for an officer to enter a home without a warrant to arrest someone:**

- 103 **1. The officer must have probable cause to believe that the person to be**
104 **arrested committed a crime.**

105 **AND**

- 106 **2. Exigent circumstances require the officer to enter the home without a**
107 **warrant.**

108
109 **The term *exigent circumstances* describes an emergency situation that**
110 **requires swift action to prevent (1) imminent danger to life or serious damage**
111 **to property, or (2) the imminent escape of a suspect or destruction of**
112 **evidence.]**

113
114 **[The officer must tell that person that the officer intends to arrest him or her,**
115 **why the arrest is being made, and the authority for the arrest.] [The officer**
116 **does not have to tell the arrested person these things if the officer has**
117 **probable cause to believe that the person is committing or attempting to**
118 **commit a crime, is fleeing after having committed a crime, or has escaped**
119 **from custody.] [The officer must also tell the arrested person the offense for**
120 **which (he/she) is being arrested if (he/she) asks for that information.]]**

123 <C. Use of Force>

124 [Special rules control the use of force.

125
126 A public officer may use reasonable force to arrest or detain someone, to
127 prevent escape, to overcome resistance, or in self-defense.

128
129 If a person knows, or reasonably should know, that a public officer is
130 arresting or detaining him or her, the person must not use force or any
131 weapon to resist an officer's use of reasonable force.

132
133 If a public officer uses unreasonable or excessive force while
134 (arresting/attempting to arrest/detaining/attempting to detain) a person, that
135 person may lawfully use reasonable force to defend (himself/herself).

136
137 A person being arrested uses *reasonable force* when he or she uses that degree
138 of force that he or she actually believes is reasonably necessary to protect
139 himself or herself from the officer's use of unreasonable or excessive force.
140 The force must be no more than a reasonable person in the same situation
141 would believe is necessary for his or her protection.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court also has a **sua sponte** duty to instruct on defendant's reliance on self-defense. (See *People v. White* (1980) 101 Cal.App.3d 161, 167–168.) On request, the court must instruct that the People have the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145.) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1980) 119 Cal.App.3d 39, 46–47.)

Give the appropriate bracketed paragraphs on the lawfulness of the officer's conduct and use of force if those instructions have not already been given in the instructions for a greater offense. If the instructions have been given, use the bracketed paragraph directing the jury to that other instruction.

In the paragraphs headed “A. Unlawful Detention,” if the case presents a factual issue of whether the defendant was in fact detained, the court should provide the jury with a definition of when a person is legally detained.

In the paragraphs headed “B. Unlawful Arrest,” several options are given depending on the crime for which the arrest was made. The general rule is that an officer may not make an arrest for a misdemeanor or infraction unless the offense was committed in the officer’s presence. (See Pen. Code, § 836(a)(1).) Statutes provide exceptions to this requirement for some misdemeanors. (See, e.g., Pen. Code, § 836(c) [violation of domestic violence protective or restraining order]; Veh. Code, § 40300.5 [driving under the influence plus traffic accident or other specified circumstance].) If the defense does not rely on the statutory limitation, neither bracketed paragraph regarding arrest without a warrant need be given. If the only offense on which the officer relied in making the arrest is a nonexempted misdemeanor or an infraction, give the first bracketed paragraph beginning “In order for an officer to lawfully arrest someone without a warrant” If the officer allegedly made the arrest for both a misdemeanor or infraction *and* a felony or exempted misdemeanor, give both bracketed paragraphs.

In cases involving multiple crimes, use the paragraph that specifies the crime that was the basis for the arrest as many times as needed to describe each underlying crime separately.

Give the bracketed language about entering a home under exigent circumstances if an arrest took place in the defendant’s home. (*People v. Wilkins* (1993) 14 Cal.App.4th 761, 777.)

The jury must determine whether the victim is a public officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445.) As with a peace officer, the court may instruct the jury on the appropriate definition of “public officer” from the statute (e.g., “a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers”). (*Ibid.*) However, the court may not instruct the jury that the victim was a public officer as a matter of law (e.g., “Officer Reed was a peace officer”). (*Ibid.*)

Give the bracketed definition of “firearm” on request if there is an issue whether the item removed from the officer was a firearm.

Related Instructions

Instruction 900, Taking Firearm or Weapon While Resisting Peace Officer
Instruction 902, Intentionally Taking or Attempting to Take Firearm From Peace Officer

Instruction 903, Intentionally Taking or Attempting to Take Firearm From Public Officer

AUTHORITY

- Elements ▶ Pen. Code, § 148(b) & (c); see *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329 [elements of Pen. Code, § 148(a) offense]; *Nuno v. San Bernardino County* (1999) 58 F.Supp. 1127, 1133 [officer lawfully performing duties]; *People v. Lopez* (1986) 188 Cal.App.3d 592, 599–600 [knowledge that other person is an officer].
- Firearm Defined ▶ Pen. Code, § 12001(b).
- Multiple Violations ▶ Pen. Code, § 148(e).
- Public Officer ▶ See, e.g., Pen. Code, §§ 831(a) [custodial officer], 831.4 [sheriff's or police security officer], 831.5 [custodial officer], 831.6 [transportation officer], 3089 [county parole officer]; *In re Frederick B.* (1987) 192 Cal.App.3d 79, 89–90 [“public officers” is broader category than “peace officers”]; see also Pen. Code, § 836.5(a) [authority to arrest without warrant].
- Public Official Defined ▶ Gov. Code, § 82048; see *In re Eddie D.* (1991) 235 Cal.App.3d 417, 421 [refers to section 82048 in defining public official].
- Unlawful Act by Officer ▶ Pen. Code, § 148(f).
- Delaying Officer From Performing Duties ▶ *People v. Allen* (1980) 109 Cal.App.3d 981, 985–986, 987.
- General Intent Crime ▶ *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329; *People v. Matthews* (1999) 70 Cal.App.4th 164, 175.
- “Take” or “Remove” Defined ▶ *People v. Matthews* (1999) 70 Cal.App.4th 164, 173, 175.
- Verbal Resistance or Obstruction ▶ *People v. Quiroga* (1993) 16 Cal.App.4th 961, 968, 970–972 [nondisclosure of identity following arrest for felony, not misdemeanor]; *People v. Green* (1997) 51 Cal.App.4th 1433, 1438 [attempt to intimidate suspected victim into denying offense].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 18–20, pp. 1103–1107.

LESSER INCLUDED OFFENSES

Attempted Removal of Firearm or Weapon ▶ Pen. Code, §§ 663, 148(b) & (c).

RELATED ISSUES

Multiple Violations

A person may be convicted of multiple violations of this section if there are multiple public officer victims. (Pen. Code, § 148(e).) However, a person may not be convicted of both resisting an officer in violation of Penal Code section 148(a) and removing a weapon or firearm from an officer in violation of Penal Code section 148(b), (c), or (d) if the resistance and removal were committed against the same officer. (Pen. Code, § 148(e).)

Other Forms of Resistance or Interference

It is a misdemeanor under Penal Code section 148(a)(1) to willfully resist, delay, or obstruct any emergency medical technician in discharging or attempting to discharge his or her duties of employment. (See Health & Saf. Code, § 1797 [defining emergency medical technician].) It is also a misdemeanor under Penal Code section 148(a)(2) to knowingly and maliciously interrupt, disrupt, impede, or otherwise interfere with the transmission of a communication over a public safety radio frequency.

STAFF NOTES

Elements

Penal Code section 148(b)–(d) provides:

(b) Every person who, during the commission of any offense described in subdivision (a), removes or takes any weapon, other than a firearm, from the person of, or immediate presence of, a public officer or peace officer shall be punished by imprisonment in a county jail not to exceed one year or in the state prison.

(c) Every person who, during the commission of any offense described in subdivision (a), removes or takes a firearm from the person of, or immediate presence of, a public officer or peace officer shall be punished by imprisonment in the state prison.

This instruction includes blanks for the name of the officer being resisted, pursuant to a suggestion in *People v. White* (1980) 101 Cal.App.3d 161, 169, fn. 3:

Count 6 (§ 148) failed to name a specific officer as the victim. Under the circumstances of this case, the victim could have been either [officer] Gonzalez or Ciolli. The preferable practice is to allege in the information the specific officer whose lawful authority was resisted. If not so alleged, the jury must specifically be instructed as to the officer involved to assure a defendant, if convicted, that the jury has reached a unanimous verdict. Otherwise the jurors could base their conclusions on defendant's conduct towards one officer with other jurors reaching their conclusion with reference to defendant's conduct in resisting a different officer.

Misdemeanor Resisting Public Officer

The accused must remove a weapon or firearm during the commission of misdemeanor resistance or obstruction, which is defined in Penal Code section 148(a)(1) & (2):

(a)(1) Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician, as defined in Division 2.5 (commencing with Section 1797) of the Health and Safety Code, in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.

(2) Except as provided by subdivision (d) of Section 653t, every person who knowingly and maliciously interrupts, disrupts, impedes, or otherwise

interferes with the transmission of a communication over a public safety radio frequency shall be punished by a fine not exceeding one thousand dollars (\$1,000), imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment.

There is no duty to define “obstruct,” as stated in *People v. Roberts* (1982) 131 Cal.App.3d Supp. 1, 6:

The words used in section 148 are sufficiently definite in their terms so that a person of ordinary understanding could interpret them [citation]; accordingly, we see no error in the trial court’s failure to define the word “obstruct.”

No Application to Officer’s Criminal Act

Penal Code section 148(f) provides:

(f) This section shall not apply if the public officer, peace officer, or emergency medical technician is disarmed while engaged in a criminal act.

Public Officer Defined

“Public officers” include a custodial officer (Pen. Code, §§ 831(a), 831.5), a sheriff’s or police security officer (Pen. Code, § 831.4), and a transportation officer (Pen. Code, § 831.6).

Note that *In re Eddie D.* (1991) 235 Cal.App.3d 417, 421, cited Government Code section 82048 in defining “public officer,” but that section actually defines “public official” as follows:

"Public official" means every member, officer, employee or consultant of a state or local government agency, but does not include judges and court commissioners in the judicial branch of government. "Public official" also does not include members of the Board of Governors and designated employees of the State Bar of California, members of the Judicial Council, and members of the Commission on Judicial Performance, provided that they are subject to the provisions of Article 2.5 (commencing with Section 6035) of Chapter 4 of Division 3 of the Business and Professions Code as provided in Section 6038 of that article.

See also *In re Rochelle B.* (1996) 49 Cal.App.4th 1212, 1221 [although juvenile hall probation counselor may be a peace and public officer, she was not a “custodial officer” for purposes of Pen. Code, § 243.1]; *People v. Showalter* (1932) 126 Cal.App. 665, 669 [court appointed receiver not a public officer].

Courts may look to the source of the public office and its corresponding duties, as discussed in *People v. Olsen* (1986) 186 Cal.App.3d 257, 265–266:

“[One] of the prime requisites [of a public office] is that [it] be created by the *constitution* or authorized by some *statute*. And it is essential that the incumbent be clothed with some portion of the sovereign functions of government, either legislative, executive, or judicial to be exercised in the interest of the public. There must also be a duty or service to be performed, and it is the nature of this duty, not its extent, that brings into existence a public office and a *public officer*. [Footnote omitted.] . . .” [Quoting Cal.Jur.3d Public Officers and Employees.]

As enacted in 1957, Penal Code section 148 applied to “public officers.” The phrase “or peace officer” was added by 1983 legislation. In 1987, misdemeanor resistance or obstruction under section 148(a) was extended to include emergency medical technicians.

Authority to Arrest Without Warrant

When authorized by ordinance, public officers may arrest without a warrant pursuant to Penal Code section 836.5(a):

(a) A public officer or employee, when authorized by ordinance, may arrest a person without a warrant whenever the officer or employee has reasonable cause to believe that the person to be arrested has committed a misdemeanor in the presence of the officer or employee that is a violation of a statute or ordinance that the officer or employee has the duty to enforce.

It’s not clear whether the paragraphs regarding lawful arrest and use of force by peace officers in instruction 900 would apply to a public officer making an arrest under section 836.5. Instruction 901 currently excludes those paragraphs.

Firearm Defined

The definition of “firearm” is borrowed from instruction 875, Assault With a Deadly Weapon or Force Likely to Produce Great Bodily Injury, which is based on Penal Code section 12001(b):

As used in this title, “firearm” means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion.

Single Conviction for Resistance and Removal Committed Against Same Officer

Penal Code section 148(e) provides:

(e) A person shall not be convicted of a violation of subdivision (a) in addition to a conviction of a violation of subdivision (b), (c), or (d) when the resistance, delay, or obstruction, and the removal or taking of the weapon or firearm or attempt thereof, was committed against the same public officer, peace officer, or emergency medical technician.

Multiple Officers as Victims

The last sentence of Penal Code section 148(e) provides:

A person may be convicted of multiple violations of this section if more than one public officer, peace officer, or emergency medical technician are victims.

Sources from Other Jurisdictions

Revised Arizona Jury Instructions, nos. 25.08, 25.08-1

Michigan Criminal Jury Instructions, nos. CJI2d 13.1, 13.2

902. Intentionally Taking or Attempting to Take Firearm From Peace Officer

1 **The defendant is charged [in Count __] with intentionally (taking/ [or]**
2 **attempting to take) a firearm from a peace officer while the officer was**
3 **performing (his/her) duties.**

4
5 **To prove that the defendant is guilty of this crime, the People must prove**
6 **that:**

- 7
- 8 **1. _____ <insert officer's name, excluding title> was a peace**
9 **officer lawfully performing (his/her) duties as a peace officer.**
 - 10
 - 11 **2. The defendant (took/ [or] attempted to take) a firearm from**
12 **_____’s <insert officer’s name, excluding title> person [or**
13 **immediate presence].**
 - 14
 - 15 **3. When the defendant acted, (he/she) intended to take the firearm**
16 **from _____’s <insert officer’s name, excluding title> person [or**
17 **immediate presence].**
 - 18

19 **[AND]**

- 20
- 21 **4. When the defendant acted, (he/she) knew, or reasonably should**
22 **have known, that _____ <insert officer’s name, excluding title>**
23 **was a peace officer performing (his/her) duties.**
 - 24

25 **[AND]**

- 26
- 27 **5. The defendant did not act (in self-defense/ [or] in defense of**
28 **someone else).]**
 - 29

30 **To prove that the defendant intended to take a firearm from _____**
31 **<insert officer’s name, excluding title>, the People must prove [at least one of]**
32 **the following:**

- 33
- 34 **[1. The defendant unfastened _____’s <insert officer’s name,**
35 **excluding title> holster strap.]**
 - 36
 - 37 **[2. The defendant partially removed the firearm from _____’s**
38 **<insert officer’s name, excluding title> holster.]**
 - 39

40 [3. The defendant released the safety on _____'s *<insert officer's*
41 *name, excluding title>* firearm.]

42
43 [4. (a) The defendant said that (he/she) intended to remove the firearm
44 from _____ *<insert officer's name, excluding title>*; (b) the
45 defendant actually touched the firearm; and (c) an independent
46 witness has given testimony that you believe, which supports the
47 conclusion that the defendant made the statement about (his/her)
48 intent and actually touched the firearm.]

49
50 [5. (a) The defendant actually had (his/her) hand on the firearm; (b)
51 the defendant tried to take it away from _____ *<insert officer's*
52 *name, excluding title>*, who was holding it; and (c) an independent
53 witness has given testimony that you believe, which supports the
54 conclusion that the defendant actually had (his/her) hand on the
55 firearm and tried to take it away from the officer.]

56
57 [6. The defendant's fingerprint[s] (was/were) found on the firearm or
58 holster.]

59
60 [7. Physical evidence authenticated by a scientifically verifiable
61 procedure establishes that the defendant touched the firearm.]

62
63 [8. _____'s *<insert officer's name, excluding title>* firearm fell
64 during a struggle and the defendant attempted to pick it up.]

65
66 [A person may intend to take a weapon from an officer without intending to
67 permanently deprive the officer of the firearm.]

68
69 [A *firearm* is any device designed to be used as a weapon, from which a
70 projectile is expelled through a barrel by the force of an explosion or other
71 form of combustion.]

72
73 [A sworn member of _____ *<insert name of agency that employs peace*
74 *officer >*, authorized by _____ *<insert appropriate section from Pen.*
75 *Code, § 830 et seq.>* to _____ *<describe statutory authority>*, is a *peace*
76 *officer.*]

77
78 [The duties of a _____ *<insert title of peace officer specified in Pen. Code,*
79 *§ 830 et seq.>* include _____ *<insert job duties>*.]

80
81 [A peace officer is not lawfully performing his or her duties if he or she is
82 (unlawfully arresting or detaining someone/ [or] using unreasonable or

83 **excessive force when (making/attempting to make) an otherwise lawful arrest**
84 **or detention).]** *<Give one or more of the following bracketed paragraphs defining*
85 *lawfulness of officer's conduct if these instructions are not already given to the*
86 *jury in the instructions for a greater offense. If the instructions have already been*
87 *given, use the first bracketed paragraph below.>*

88
89 *<Instruction Already Given>*

90 **[Instruction _____<insert instruction number> explains when an officer is**
91 **(unlawfully arresting or detaining someone/ [or] using unreasonable or**
92 **excessive force when (making/attempting to make) an otherwise lawful arrest**
93 **or detention).]**

94
95 *<A. Unlawful Detention>*

96 **[A peace officer may legally detain someone if:**

- 97
98 **1. He or she knows specific facts that lead him or her to suspect that the**
99 **person to be detained has been, is, or is about to be involved in activity**
100 **relating to crime.**

101
102 **AND**

- 103
104 **2. A reasonable officer who knew the same facts would have the same**
105 **suspicion.**

106
107 **Any other detention is unlawful.**

108
109 **In deciding whether the detention was unlawful, consider evidence of the**
110 **officer's training and experience and all the circumstances known by the**
111 **officer when he or she detained the person.]**

112
113 *<B. Unlawful Arrest>*

114 **[A peace officer may legally arrest someone [either] (on the basis of an arrest**
115 **warrant/ [or] if he or she has probable cause to make the arrest).**

116
117 **Any other arrest is unlawful.**

118
119 **An officer has *probable cause* to arrest when he or she knows facts that would**
120 **lead a person of ordinary care and prudence to honestly and strongly suspect**
121 **that the person to be arrested is guilty of a crime.**

122
123 **[In order for an officer to lawfully arrest someone without a warrant for a**
124 **misdemeanor or infraction, the officer must have probable cause to believe**

that the person to be arrested committed a misdemeanor or infraction in the officer's presence.]

[[On the other hand,] (In/in) order for an officer to lawfully arrest someone for a (felony/ [or] _____ <insert misdemeanor not requiring commission in officer's presence; see Bench Notes>) without a warrant, that officer must have probable cause to believe the person to be arrested committed a (felony/ [or] _____ <insert misdemeanor not requiring commission in officer's presence; see Bench Notes>). However, it is not required that the offense be committed in the officer's presence.]

_____ <insert crime that was basis for arrest> is a (felony/misdemeanor/infraction).

[In order for an officer to enter a home without a warrant to arrest someone:

1. The officer must have probable cause to believe that the person to be arrested committed a crime.

AND

2. Exigent circumstances require the officer to enter the home without a warrant.

The term *exigent circumstances* describes an emergency situation that requires swift action to prevent (1) imminent danger to life or serious damage to property, or (2) the imminent escape of a suspect or destruction of evidence.]

[The officer must tell that person that the officer intends to arrest him or her, why the arrest is being made, and the authority for the arrest.] [The officer does not have to tell the arrested person these things if the officer has probable cause to believe that the person is committing or attempting to commit a crime, is fleeing after having committed a crime, or has escaped from custody.][The officer must also tell the arrested person the offense for which (he/she) is being arrested if (he/she) asks for that information.]]

<C. Use of Force>

[Special rules control the use of force.

A peace officer may use reasonable force to arrest or detain someone, to prevent escape, to overcome resistance, or in self-defense.

168 **If a person knows, or reasonably should know, that a peace officer is**
169 **arresting or detaining him or her, the person must not use force or any**
170 **weapon to resist an officer's use of reasonable force.**

171
172 **If a peace officer uses unreasonable or excessive force while**
173 **(arresting/attempting to arrest/detaining/attempting to detain) a person, that**
174 **person may lawfully use reasonable force to defend (himself/herself).**

175
176 **A person being arrested uses *reasonable force* when he or she uses that degree**
177 **of force that he or she actually believes is reasonably necessary to protect**
178 **himself or herself from the officer's use of unreasonable or excessive force.**
179 **The force must be no more than a reasonable person in the same situation**
180 **would believe is necessary for his or her protection.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Depending on the evidence in the case, give the appropriate bracketed paragraph or paragraphs describing direct but ineffectual acts that establish defendant's specific intent to remove or take a firearm. (See Pen. Code, § 148(d)(1)–(8).)

The court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168.) On request, the court must instruct that the People have the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145.) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47.)

Give the appropriate bracketed paragraphs on the lawfulness of the officer's conduct and use of force if those instructions have not already been given in the instructions for a greater offense. If the instructions have been given, use the bracketed paragraph directing the jury to that other instruction.

In the paragraphs headed "A. Unlawful Detention," if the case presents a factual issue of whether the defendant was in fact detained, the court should provide the jury with a definition of when a person is legally detained.

In the paragraphs headed “B. Unlawful Arrest,” several options are given depending on the crime for which the arrest was made. The general rule is that an officer may not make an arrest for a misdemeanor or infraction unless the offense was committed in the officer’s presence. (See Pen. Code, § 836(a)(1).) Statutes provide exceptions to this requirement for some misdemeanors. (See, e.g., Pen. Code, § 836(c) [violation of domestic violence protective or restraining order]; Veh. Code, § 40300.5 [driving under the influence plus traffic accident or other specified circumstance].) If the defense does not rely on the statutory limitation, neither bracketed paragraph regarding arrest without a warrant need be given. If the only offense on which the officer relied in making the arrest is a nonexempted misdemeanor or an infraction, give the first bracketed paragraph beginning “In order for an officer to lawfully arrest someone without a warrant” If the officer allegedly made the arrest for both a misdemeanor or infraction *and* a felony or exempted misdemeanor, give both bracketed paragraphs.

In cases involving multiple crimes, use the paragraph that specifies the crime that was the basis for the arrest as many times as needed to describe each underlying crime separately.

Give the bracketed language about entering a home under exigent circumstances if the arrest took place in the defendant’s home. (*People v. Wilkins* (1993) 14 Cal.App.4th 761, 777.)

The jury must determine whether the victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445.) The court may instruct the jury on the appropriate definition of “peace officer” from the statute (e.g., “a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers”). (*Ibid.*) However, the court may not instruct the jury that the victim was a peace officer as a matter of law (e.g., “Officer Reed was a peace officer”). (*Ibid.*)

Give the bracketed definition of “firearm” on request if there is an issue whether the item removed from the officer was a firearm.

Related Instructions

Instruction 903, Intentionally Taking or Attempting to Take Firearm From Public Officer

Instruction 1305, Theft: Degrees (theft of firearm from an officer)

AUTHORITY

Elements ▶ Pen. Code, § 148(d); see *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329 [elements of Pen. Code, § 148(a) offense]; *Nuno v. San*

Bernardino County (1999) 58 F.Supp. 1127, 1133 [officer lawfully performing duties]; *People v. Lopez* (1986) 188 Cal.App.3d 592, 599–600 [knowledge that other person is an officer].

Firearm Defined ▶ Pen. Code, § 12001(b).

Multiple Violations ▶ Pen. Code, § 148(e).

Peace Officer Defined ▶ Pen. Code, § 830 et seq.

Unlawful Arrest or Act by Officer ▶ Pen. Code, § 148(f); see *Franklin v. Riverside County* (1997) 971 F.Supp. 1332, 1335–1336 [unlawful arrest if officer uses excessive force]; *People v. Curtis* (1969) 70 Cal.2d 347, 354 [§ 148 applies only to lawful arrests]; *Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1409 [excessive force by officer not within duties].

Burden on People to Prove Arrest Lawful ▶ *People v. Castain* (1981) 122 Cal.App.3d 138, 145; *In re Joseph R.* (2000) 85 Cal.App.4th 975, 982.

Take or Remove Defined ▶ See *People v. Matthews* (1999) 70 Cal.App.4th 164, 173, 175 [in context of Pen. Code, § 148(a)].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 18–20, pp. 1103–1107.

RELATED ISSUES

Multiple or Single Violations

A person may be convicted of multiple violations of this section if there are multiple peace officer victims. (Pen. Code, § 148(e).) However, a person may not be convicted of both resisting an officer in violation of Penal Code section 148(a) and removing a weapon or firearm from an officer in violation of Penal Code section 148(b), (c), or (d) if the resistance and removal were committed against the same officer. (Pen. Code, § 148(e).)

STAFF NOTES

Elements

Penal Code section 148(d) provides:

(d) Except as provided in subdivision (c) and notwithstanding subdivision (a) of Section 489, every person who removes or takes without intent to permanently deprive, or who attempts to remove or take a firearm from the person of, or immediate presence of, a public officer or peace officer, while the officer is engaged in the performance of his or her lawful duties, shall be punished by imprisonment in a county jail not to exceed one year or in the state prison.

In order to prove a violation of this subdivision, the prosecution shall establish that the defendant had the specific intent to remove or take the firearm by demonstrating that any of the following direct, but ineffectual, acts occurred:

- (1) The officer's holster strap was unfastened by the defendant.
- (2) The firearm was partially removed from the officer's holster by the defendant.
- (3) The firearm safety was released by the defendant.
- (4) An independent witness corroborates that the defendant stated that he or she intended to remove the firearm and the defendant actually touched the firearm.
- (5) An independent witness corroborates that the defendant actually had his or her hand on the firearm and tried to take the firearm away from the officer who was holding it.
- (6) The defendant's fingerprint was found on the firearm or holster.
- (7) Physical evidence authenticated by a scientifically verifiable procedure established that the defendant touched the firearm.
- (8) In the course of any struggle, the officer's firearm fell and the defendant attempted to pick it up.

This instruction includes blanks for the name of the officer being resisted, pursuant to a suggestion in *People v. White* (1980) 101 Cal.App.3d 161, 169, fn. 3:

Count 6 (§ 148) failed to name a specific officer as the victim. Under the circumstances of this case, the victim could have been either [officer] Gonzalez or Ciolli. The preferable practice is to allege in the information the specific officer whose lawful authority was resisted. If not so alleged, the jury must specifically be instructed as to the officer involved to assure a defendant, if convicted, that the jury has reached a unanimous verdict. Otherwise the jurors could base their conclusions on defendant's conduct

towards one officer with other jurors reaching their conclusion with reference to defendant's conduct in resisting a different officer.

Corroboration by Independent Witness

No cases were found directly applying Penal Code section 148(d)(4) or (5). The court in *People v. Matthews* (1999) 70 Cal.App.4th 164, 173–174, generally discussed the intent requirement in defining “take” and “remove” [italics in original; bold added]:

The words "take" and "remove," particularly in the context of a statute concerning disarming an officer in the performance of his or her duties, connote a physical action corresponding to grabbing, holding, seizing, pushing, lifting, picking up, or similar notions. [¶] Section 148, subdivision (d), is instructive. It defines a felony/misdemeanor wobbler offense for *attempting* to take or remove the officer's firearm, and requires proof of one of a number of ineffectual actions which, if completed, would have constituted a taking or removal of the weapon: That is, if a defendant grabs at the gun, tries to pull it out of the holster, unsnaps the holster, picks up the weapon after it has been dropped, and so on, these actions are indicative of a specific intent to gain possession or control of the weapon, away from the officer. **Similarly, objectively perceptible evidence may help prove the defendant tried to wrest control or possession of the weapon away from the officer; if, for example,** the defendant's fingerprint or DNA is found on the officer's gun, or if **a third party witness saw certain movements or actions in which the defendant also touched the weapon**, this evidence would support a conviction of attempt to take or remove the gun from the officer. A violation of section 148, subdivision (d) thus cannot be established unless the defendant has at least tried to touch or hold the gun.

No Application to Officer's Criminal Act

Penal Code section 148(f) provides:

(f) This section shall not apply if the public officer, peace officer, or emergency medical technician is disarmed while engaged in a criminal act.

Peace Officer Defined

Penal Code section 417(e) defines “peace officer” as follows:

(e) As used in this section, "peace officer" means any person designated as a peace officer pursuant to Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2.

The definition of a “sworn officer” is borrowed from instruction 876, Assault With a Deadly Weapon or Force Likely to Produce Great Bodily Injury on Firefighter or Peace Officer.

Firearm Defined

The definition of “firearm” is borrowed from instruction 875, Assault With a Deadly Weapon or Force Likely to Produce Great Bodily Injury, which is based on Penal Code section 12001(b):

As used in this title, “firearm” means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion.

Lawful Detention or Arrest and Use of Force

See staff notes to instruction 900, Taking Firearm or Weapon While Resisting Peace Officer.

Single Conviction for Resistance and Removal Committed Against Same Officer

Penal Code section 148(e) provides:

(e) A person shall not be convicted of a violation of subdivision (a) in addition to a conviction of a violation of subdivision (b), (c), or (d) when the resistance, delay, or obstruction, and the removal or taking of the weapon or firearm or attempt thereof, was committed against the same public officer, peace officer, or emergency medical technician.

Multiple Officers as Victims

The last sentence of Penal Code section 148(e) provides:

A person may be convicted of multiple violations of this section if more than one public officer, peace officer, or emergency medical technician are victims.

903. Intentionally Taking or Attempting to Take Firearm From Public Officer

1 **The defendant is charged [in Count __] with intentionally (taking/ [or]**
2 **attempting to take) a firearm from a public officer while the officer was**
3 **performing (his/her) duties.**

4
5 **To prove that the defendant is guilty of this crime, the People must prove**
6 **that:**

- 7
- 8 **1. _____ <insert officer's name, excluding title> was a public**
9 **officer lawfully performing (his/her) duties as a public officer.**
 - 10
 - 11 **2. The defendant (took/ [or] attempted to take a firearm from**
12 **_____’s <insert officer’s name, excluding title> person [or**
13 **immediate presence].**
 - 14
 - 15 **3. When the defendant acted, (he/she) intended to take the firearm**
16 **from _____’s <insert officer’s name, excluding title> person [or**
17 **immediate presence].**

18
19 **[AND]**

- 20
- 21 **4. When the defendant acted, (he/she) knew, or reasonably should**
22 **have known, that _____ <insert officer’s name, excluding title>**
23 **was a public officer performing (his/her) duties.**

24
25 **[AND]**

- 26
- 27 **5. The defendant did not act (in self-defense/ [or] in defense of**
28 **someone else).]**

29
30 **To prove that the defendant intended to take a firearm from _____**
31 **<insert officer’s name, excluding title>, the People must prove [at least one of]**
32 **the following:**

- 33
- 34 **[1. The defendant unfastened _____’s <insert officer’s name,**
35 **excluding title> holster strap.]**
 - 36
 - 37 **[2. The defendant partially removed the firearm from _____’s**
38 **<insert officer’s name, excluding title> holster.]**
- 39

40 [3. The defendant released the safety on _____'s *<insert officer's*
41 *name, excluding title>* firearm.]

42
43 [4. (a) The defendant said that (he/she) intended to remove the firearm
44 from _____ *<insert officer's name, excluding title>*; (b) the
45 defendant actually touched the firearm; and (c) an independent
46 witness has given testimony that you believe, which supports the
47 conclusion that the defendant made the statement about (his/her)
48 intent and actually touched the firearm.]

49
50 [5. (a) The defendant actually had (his/her) hand on the firearm; (b)
51 the defendant tried to take it away from _____ *<insert officer's*
52 *name, excluding title>*, who was holding it; and (c) an independent
53 witness has given testimony that you believe, which supports the
54 conclusion that the defendant actually had (his/her) hand on the
55 firearm and tried to take it away from the officer.]

56
57 [6. The defendant's fingerprint[s] (was/were) found on the firearm or
58 holster.]

59
60 [7. Physical evidence authenticated by a scientifically verifiable
61 procedure establishes that the defendant touched the firearm.]

62
63 [8. _____'s *<insert officer's name, excluding title>* firearm fell
64 during a struggle and the defendant attempted to pick it up.]

65
66 [A person may intend to take a weapon from an officer without intending to
67 permanently deprive the officer of the firearm.]

68
69 [A *firearm* is any device designed to be used as a weapon, from which a
70 projectile is expelled through a barrel by the force of an explosion or other
71 form of combustion.]

72
73 [An officer [or employee] of _____ *<insert name of state or local*
74 *government agency that employs public officer >* is a *public officer*.]

75
76 [The duties of a _____ *<insert title of public officer>* include _____
77 *<insert job duties>*.]

78
79 [A public officer is not lawfully performing his or her duties if he or she is
80 (unlawfully arresting or detaining someone/ [or] using unreasonable or
81 excessive force when (making/attempting to make) an otherwise lawful arrest
82 or detention).] *<Give one or more of the following bracketed paragraphs defining*

lawfulness of officer's conduct if these instructions are not already given to the jury in the instructions for a greater offense. If the instructions have already been given, use the first bracketed paragraph below.>

<Instruction Already Given>

[Instruction _____<insert instruction number> explains when an officer is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force when (making/attempting to make) an otherwise lawful arrest or detention).]

<A. Unlawful Detention>

[A public officer may legally detain someone if:

1. He or she knows specific facts that lead him or her to suspect that the person to be detained has been, is, or is about to be involved in activity relating to crime.

AND

2. A reasonable officer who knew the same facts would have the same suspicions.

Any other detention is unlawful.

In deciding whether the detention was unlawful, consider evidence of the officer's training and experience and all the circumstances known by the officer when he or she detained the person.]

<B. Unlawful Arrest>

[A public officer may legally arrest someone [either] (on the basis of an arrest warrant/ [or] if he or she has probable cause to make the arrest).

Any other arrest is unlawful.

An officer has *probable cause* to arrest when he or she knows facts that would lead a person of ordinary care and prudence to honestly and strongly suspect that the person to be arrested is guilty of a crime.

[In order for an officer to lawfully arrest someone without a warrant for a misdemeanor or infraction, the officer must have probable cause to believe that the person to be arrested committed a misdemeanor or infraction in the officer's presence.]

[[On the other hand,] (In/in) order for an officer to lawfully arrest someone for a (felony/ [or] _____<insert misdemeanor not requiring commission in

officer's presence; see Bench Notes>] without a warrant, that officer must have probable cause to believe the person to be arrested committed a (felony/ [or] _____ <insert misdemeanor not requiring commission in officer's presence; see Bench Notes>). However, it is not required that the offense be committed in the officer's presence.]

_____ <insert crime that was basis for arrest> is a (felony/misdemeanor/infracton).

[In order for an officer to enter a home without a warrant to arrest someone:

1. The officer must have probable cause to believe that the person to be arrested committed a crime.

AND

2. Exigent circumstances require the officer to enter the home without a warrant.

The term *exigent circumstances* describes an emergency situation that requires swift action to prevent (1) imminent danger to life or serious damage to property, or (2) the imminent escape of a suspect or destruction of evidence.]

[The officer must tell that person that the officer intends to arrest him or her, why the arrest is being made, and the authority for the arrest.] [The officer does not have to tell the arrested person these things if the officer has probable cause to believe that the person is committing or attempting to commit a crime, is fleeing after having committed a crime, or has escaped from custody.] [The officer must also tell the arrested person the offense for which (he/she) is being arrested if (he/she) asks for that information.]]

<C. Use of Force>

[Special rules control the use of force.

A public officer may use reasonable force to arrest or detain someone, to prevent escape, to overcome resistance, or in self-defense.

If a person knows, or reasonably should know, that a public officer is arresting or detaining him or her, the person must not use force or any weapon to resist an officer's use of reasonable force.

164 **If a public officer uses unreasonable or excessive force while**
165 **(arresting/attempting to arrest/detaining/attempting to detain) a person, that**
166 **person may lawfully use reasonable force to defend (himself/herself).**

167
168 **A person being arrested uses *reasonable force* when he or she uses that degree**
169 **of force that he or she actually believes is reasonably necessary to protect**
170 **himself or herself from the officer's use of unreasonable or excessive force.**
171 **The force must be no more than a reasonable person in the same situation**
172 **would believe is necessary for his or her protection.]**
173

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Depending on the evidence in the case, give the appropriate bracketed paragraph or paragraphs describing direct but ineffectual acts that establish a specific intent to remove or take a firearm. (See Pen. Code, § 148(d)(1)–(8).)

The court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168.) On request, the court must instruct that the People have the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145.) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47.)

Give the appropriate bracketed paragraphs on the lawfulness of the officer's conduct and use of force if those instructions have not already been given in the instructions for a greater offense. If the instructions have been given, use the bracketed paragraph directing the jury to that other instruction.

In the paragraphs headed "A. Unlawful Detention," if the case presents a factual issue of whether the defendant was in fact detained, the court should provide the jury with a definition of when a person is legally detained.

In the paragraphs headed "B. Unlawful Arrest," several options are given depending on the crime for which the arrest was made. The general rule is that an officer may not make an arrest for a misdemeanor or infraction unless the offense

was committed in the officer's presence. (See Pen. Code, § 836(a)(1).) Statutes provide exceptions to this requirement for some misdemeanors. (See, e.g., Pen. Code, § 836(c) [violation of domestic violence protective or restraining order]; Veh. Code, § 40300.5 [driving under the influence plus traffic accident or other specified circumstance].) If the defense does not rely on the statutory limitation, neither bracketed paragraph regarding arrest without a warrant need be given. If the only offense on which the officer relied in making the arrest is a nonexempted misdemeanor or an infraction, give the first bracketed paragraph beginning "In order for an officer to lawfully arrest someone without a warrant" If the officer allegedly made the arrest for both a misdemeanor or infraction *and* a felony or exempted misdemeanor, give both bracketed paragraphs.

In cases involving multiple crimes, use the paragraph that specifies the crime that was the basis for the arrest as many times as needed to describe each underlying crime separately.

Give the bracketed language about entering a home under exigent circumstances if an arrest took place in the defendant's home. (*People v. Wilkins* (1993) 14 Cal.App.4th 761, 777.)

The jury must determine whether the victim is a public officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445.) As with a peace officer, the court may instruct the jury on the appropriate definition of "public officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). (*Ibid.*) However, the court may not instruct the jury that the victim was a public officer as a matter of law (e.g., "Officer Reed was a peace officer"). (*Ibid.*)

Give the bracketed definition of "firearm" on request if there is an issue whether the item removed from the officer was a firearm.

Related Instructions

Instruction 903, Intentionally Taking or Attempting to Take Firearm From Public Officer

Instruction 1305, Theft: Degrees (theft of firearm from an officer)

AUTHORITY

- Elements ▶ Pen. Code, § 148(d); see *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329 [elements of Pen. Code, § 148(a) offense]; *Nuno v. San Bernardino County* (1999) 58 F.Supp. 1127, 1133 [officer lawfully performing duties]; *People v. Lopez* (1986) 188 Cal.App.3d 592, 599–600 [knowledge that other person is an officer].
- Firearm Defined ▶ Pen. Code, § 12001(b).
- Multiple Violations ▶ Pen. Code, § 148(e).
- Public Officer ▶ See, e.g., Pen. Code, §§ 831(a) [custodial officer], 831.4 [sheriff's or police security officer], 831.5 [custodial officer], 831.6 [transportation officer], 3089 [county parole officer]; *In re Frederick B.* (1987) 192 Cal.App.3d 79, 89–90 [“public officers” is broader category than “peace officers”]; see also Pen. Code, § 836.5(a) [authority to arrest without warrant].
- Public Official Defined ▶ Gov. Code, § 82048; see *In re Eddie D.* (1991) 235 Cal.App.3d 417, 421 [refers to section 82048 in defining public official].
- Unlawful Act by Officer ▶ Pen. Code, § 148(f).
- Burden on People to Prove Arrest Lawful ▶ *People v. Castain* (1981) 122 Cal.App.3d 138, 145; *In re Joseph R.* (2000) 85 Cal.App.4th 975, 982.
- Take or Remove Defined ▶ See *People v. Matthews* (1999) 70 Cal.App.4th 164, 173, 175 [in context of Pen. Code, § 148(a)].
- 2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, §§ 18–20, pp. 1103–1107.

RELATED ISSUES

Multiple or Single Violations

A person may be convicted of multiple violations of this section if there are multiple public officer victims. (Pen. Code, § 148(e).) However, a person may not be convicted of both resisting an officer in violation of Penal Code section 148(a) and removing a weapon or firearm from an officer in violation of Penal Code section 148(b), (c), or (d) if the resistance and removal were committed against the same officer. (Pen. Code, § 148(e).)

STAFF NOTES

Elements

Penal Code section 148(d) provides:

(d) Except as provided in subdivision (c) and notwithstanding subdivision (a) of Section 489, every person who removes or takes without intent to permanently deprive, or who attempts to remove or take a firearm from the person of, or immediate presence of, a public officer or peace officer, while the officer is engaged in the performance of his or her lawful duties, shall be punished by imprisonment in a county jail not to exceed one year or in the state prison.

In order to prove a violation of this subdivision, the prosecution shall establish that the defendant had the specific intent to remove or take the firearm by demonstrating that any of the following direct, but ineffectual, acts occurred:

- (1) The officer's holster strap was unfastened by the defendant.
- (2) The firearm was partially removed from the officer's holster by the defendant.
- (3) The firearm safety was released by the defendant.
- (4) An independent witness corroborates that the defendant stated that he or she intended to remove the firearm and the defendant actually touched the firearm.
- (5) An independent witness corroborates that the defendant actually had his or her hand on the firearm and tried to take the firearm away from the officer who was holding it.
- (6) The defendant's fingerprint was found on the firearm or holster.
- (7) Physical evidence authenticated by a scientifically verifiable procedure established that the defendant touched the firearm.
- (8) In the course of any struggle, the officer's firearm fell and the defendant attempted to pick it up.

This instruction includes blanks for the name of the officer being resisted, pursuant to a suggestion in *People v. White* (1980) 101 Cal.App.3d 161, 169, fn. 3:

Count 6 (§ 148) failed to name a specific officer as the victim. Under the circumstances of this case, the victim could have been either [officer] Gonzalez or Ciolli. The preferable practice is to allege in the information the specific officer whose lawful authority was resisted. If not so alleged, the jury must specifically be instructed as to the officer involved to assure a defendant, if convicted, that the jury has reached a unanimous verdict. Otherwise the jurors could base their conclusions on defendant's conduct

towards one officer with other jurors reaching their conclusion with reference to defendant's conduct in resisting a different officer.

No Application to Officer's Criminal Act

Penal Code section 148(f) provides:

(f) This section shall not apply if the public officer, peace officer, or emergency medical technician is disarmed while engaged in a criminal act.

Public Officer Defined

"Public officers" include a custodial officer (Pen. Code, §§ 831(a), 831.5), a sheriff's or police security officer (Pen. Code, § 831.4), and a transportation officer (Pen. Code, § 831.6).

Note that *In re Eddie D.* (1991) 235 Cal.App.3d 417, 421, cited Government Code section 82048 in defining "public officer," but that section actually defines "public official" as follows:

"Public official" means every member, officer, employee or consultant of a state or local government agency, but does not include judges and court commissioners in the judicial branch of government. "Public official" also does not include members of the Board of Governors and designated employees of the State Bar of California, members of the Judicial Council, and members of the Commission on Judicial Performance, provided that they are subject to the provisions of Article 2.5 (commencing with Section 6035) of Chapter 4 of Division 3 of the Business and Professions Code as provided in Section 6038 of that article.

See additional staff notes regarding "public officer" in instruction 901, Taking Firearm or Weapon While Resisting Public Officer.

Authority to Arrest Without Warrant

When authorized by ordinance, public officers may arrest without a warrant pursuant to Penal Code section 836.5(a):

(a) A public officer or employee, when authorized by ordinance, may arrest a person without a warrant whenever the officer or employee has reasonable cause to believe that the person to be arrested has committed a misdemeanor in the presence of the officer or employee that is a violation of a

statute or ordinance that the officer or employee has the duty to enforce.

It's not clear whether the paragraphs regarding lawful arrest and use of force by peace officers in instruction 900 would apply to a public officer making an arrest under section 836.5. Instruction 903 currently excludes those paragraphs.

Firearm Defined

The definition of "firearm" is borrowed from instruction 875, Assault With a Deadly Weapon or Force Likely to Produce Great Bodily Injury, which is based on Penal Code section 12001(b):

As used in this title, "firearm" means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion.

Single Conviction for Resistance and Removal Committed Against Same Officer

Penal Code section 148(e) provides:

(e) A person shall not be convicted of a violation of subdivision (a) in addition to a conviction of a violation of subdivision (b), (c), or (d) when the resistance, delay, or obstruction, and the removal or taking of the weapon or firearm or attempt thereof, was committed against the same public officer, peace officer, or emergency medical technician.

Multiple Officers as Victims

The last sentence of Penal Code section 148(e) provides:

A person may be convicted of multiple violations of this section if more than one public officer, peace officer, or emergency medical technician are victims.

904. Causing Death or Serious Bodily Injury While Resisting Peace Officer

1 **The defendant is charged [in Count __] with causing (the death of/serious**
2 **bodily injury to) a peace officer performing (his/her) duties.**

3
4 **To prove that the defendant is guilty of this crime, the People must prove**
5 **that:**

- 6
7 1. _____ *<insert officer's name, excluding title>* **was a peace**
8 **officer lawfully performing or attempting to perform (his/her)**
9 **duties as a peace officer.**
- 10
11 2. **The defendant willfully resisted** _____ *<insert officer's name,*
12 *excluding title>* **in the performance of or the attempt to perform**
13 **(his/her) duties.**
- 14
15 3. **When the defendant acted, (he/she) knew, or reasonably should**
16 **have known, that** _____ *<insert officer's name, excluding title>*
17 **was a peace officer performing or attempting to perform (his/her)**
18 **duties.**
- 19
20 4. _____'s *<insert officer's name, excluding title>* **actions were**
21 **reasonable, based on the facts or circumstances confronting**
22 **(him/her) at the time.**
- 23
24 5. **The detention and arrest of (the defendant/ _____** *<insert name*
25 *of person other than defendant who was arrested>)* **were lawful and**
26 **there was probable cause to detain.**

27
28 **[AND]**

- 29
30 6. **The defendant's willful resistance proximately caused (the death**
31 **of/serious bodily injury to) _____** *<insert officer's name,*
32 *excluding title>.*

33
34 **[AND]**

- 35
36 7. **The defendant did not act (in self-defense/ [or] in defense of**
37 **someone else).]**
38

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

In order to prove that _____'s <insert officer's name, excluding title> (death/serious bodily injury) was *proximately caused* by the defendant's willful resistance, the People must prove that:

1. A reasonable and prudent person in the defendant's position would have foreseen that (his/her) willful resistance could begin a chain of events likely to result in the officer's death or serious bodily injury.

[AND]

2. Defendant's willful resistance was a direct and substantial factor in causing _____'s <insert officer's name, excluding title> (death/serious bodily injury).

[AND]

3. _____'s <insert officer's name, excluding title> (death/serious bodily injury) would not have happened if the defendant had not willfully resisted _____ <insert officer's name, excluding title> from performing or attempting to perform (his/her) duties.]

A *substantial factor* is more than a trivial or remote factor. However, it need not have been the only factor that caused _____'s <insert officer's name, excluding title> (death/serious bodily injury).

[A *serious bodily injury* means a serious impairment of physical condition, including[, but not limited to, the following:] (loss of consciousness[,]/ concussion[,]/ bone fracture[,]/ protracted loss or impairment of function of any bodily member or organ[,]/ a wound requiring extensive suturing[,]/ [and/or] serious disfigurement).]

[_____ <insert description of injury when appropriate; see Bench Notes> is a serious bodily injury.]

[A sworn member of _____ <insert name of agency that employs peace officer is employed>, authorized by _____ <insert appropriate section from Pen. Code, § 830 et seq.> to _____ <describe statutory authority>, is a peace officer.]

[The duties of a _____ <insert title of peace officer specified in Pen. Code, § 830 et seq.> include _____ <insert job duties>.]

[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force when (making/attempting to make) an otherwise lawful arrest or detention).] <Give one or more of the following bracketed paragraphs defining lawfulness of officer's conduct if these instructions are not already given to the jury in the instructions for a greater offense. If the instructions have already been given, use the first bracketed paragraph below.>

<Instruction Already Given>

[Instruction _____ <insert instruction number> explains when an officer is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force when (making/attempting to make) an otherwise lawful arrest or detention).]

<A. Unlawful Detention>

[A peace officer may legally detain someone if:

1. He or she knows specific facts that lead him or her to suspect that the person to be detained has been, is, or is about to be involved in activity relating to crime.

AND

2. A reasonable officer who knew the same facts would have the same suspicion.

Any other detention is unlawful.

In deciding whether the detention was unlawful, consider evidence of the officer's training and experience and all the circumstances known by the officer when he or she detained the person.]

<B. Unlawful Arrest>

[A peace officer may legally arrest someone [either] (on the basis of an arrest warrant/ [or] if he or she has probable cause to make the arrest).

Any other arrest is unlawful.

123 An officer has *probable cause* to arrest when he or she knows facts that would
124 lead a person of ordinary care and prudence to honestly and strongly suspect
125 that the person to be arrested is guilty of a crime.

126
127 [In order for an officer to lawfully arrest someone without a warrant for a
128 misdemeanor or infraction, the officer must have probable cause to believe
129 that the person to be arrested committed a misdemeanor or infraction in the
130 officer's presence.]

131
132 [[On the other hand,] (In/in) order for an officer to lawfully arrest someone
133 for a (felony/ [or] _____ <insert misdemeanor not requiring commission in
134 officer's presence; see Bench Notes>) without a warrant, that officer must have
135 probable cause to believe the person to be arrested committed a (felony/ [or]
136 _____ <insert misdemeanor not requiring commission in officer's presence;
137 see Bench Notes>). However, it is not required that the offense be committed
138 in the officer's presence.]

139
140 _____ <insert crime that was basis for arrest> is a
141 (felony/misdemeanor/infraction).

142
143 [In order for an officer to enter a home without a warrant to arrest someone:

- 144
145 1. The officer must have probable cause to believe that the person to be
146 arrested committed a crime.

147
148 AND

- 149
150 2. Exigent circumstances require the officer to enter the home without a
151 warrant.

152
153 The term *exigent circumstances* describes an emergency situation that
154 requires swift action to prevent (1) imminent danger to life or serious damage
155 to property, or (2) the imminent escape of a suspect or destruction of
156 evidence.]

157
158 [The officer must tell that person that the officer intends to arrest him or her,
159 why the arrest is being made, and the authority for the arrest.] [The officer
160 does not have to tell the arrested person these things if the officer has
161 probable cause to believe that the person is committing or attempting to
162 commit a crime, is fleeing after having committed a crime, or has escaped
163 from custody.] [The officer must also tell the arrested person the offense for
164 which (he/she) is being arrested if (he/she) asks for that information.]]

166 <C. Use of Force>

167 [Special rules control the use of force.

168
169 **A peace officer may use reasonable force to arrest or detain someone, to**
170 **prevent escape, to overcome resistance, or in self-defense.**

171
172 **If a person knows, or reasonably should know, that a peace officer is**
173 **arresting or detaining him or her, the person must not use force or any**
174 **weapon to resist an officer's use of reasonable force.**

175
176 **If a peace officer uses unreasonable or excessive force while**
177 **(arresting/attempting to arrest/detaining/attempting to detain) a person, that**
178 **person may lawfully use reasonable force to defend (himself/herself).**

179
180 **A person being arrested uses *reasonable force* when he or she uses that degree**
181 **of force that he or she actually believes is reasonably necessary to protect**
182 **himself or herself from the officer's use of unreasonable or excessive force.**
183 **The force must be no more than a reasonable person in the same situation**
184 **would believe is necessary for his or her protection.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168.) On request, the court must instruct that the People have the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145.) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47.)

Give the appropriate bracketed paragraphs on the lawfulness of the officer's conduct and use of force if those instructions have not already been given in the instructions for a greater offense. If the instructions have been given, use the bracketed paragraph directing the jury to that other instruction.

In the paragraphs headed “A. Unlawful Detention,” if the case presents a factual issue of whether the defendant was in fact detained, the court should provide the jury with a definition of when a person is legally detained.

In the paragraphs headed “B. Unlawful Arrest,” several options are given depending on the crime for which the arrest was made. The general rule is that an officer may not make an arrest for a misdemeanor or infraction unless the offense was committed in the officer’s presence. (See Pen. Code, § 836(a)(1).) Statutes provide exceptions to this requirement for some misdemeanors. (See, e.g., Pen. Code, § 836(c) [violation of domestic violence protective or restraining order]; Veh. Code, § 40300.5 [driving under the influence plus traffic accident or other specified circumstance].) If the defense does not rely on the statutory limitation, neither bracketed paragraph regarding arrest without a warrant need be given. If the only offense on which the officer relied in making the arrest is a nonexempted misdemeanor or an infraction, give the first bracketed paragraph beginning “In order for an officer to lawfully arrest someone without a warrant . . .” If the officer allegedly made the arrest for both a misdemeanor or infraction *and* a felony or exempted misdemeanor, give both bracketed paragraphs.

In cases involving multiple crimes, use the paragraph that specifies the crime that was the basis for the arrest as many times as needed to describe each underlying crime separately.

Give the bracketed language about entering a home under exigent circumstances if the arrest took place in the defendant’s home. (*People v. Wilkins* (1993) 14 Cal.App.4th 761, 777.)

The jury must determine whether the victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445.) The court may instruct the jury in the appropriate definition of “peace officer” from the statute (e.g., “a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers”). (*Ibid.*) However, the court may not instruct the jury that the victim was a peace officer as a matter of law (e.g., “Officer Reed was a peace officer”). (*Ibid.*)

Whether the complaining witness suffered a serious bodily injury is a question of fact for the jury to determine. If the defendant disputes that the injury suffered was a serious bodily injury, give on request the bracketed paragraph that begins with “[A *serious bodily injury* means a serious impairment” If the parties agree that the injury suffered was a serious bodily injury, give on request the next bracketed paragraph, with the appropriate insertion.

AUTHORITY

Elements ▶ Pen. Code, § 148.10(a) & (b).

Peace Officer Defined ▶ Pen. Code, § 830 et seq.

Serious Bodily Injury Defined ▶ Pen. Code, §§ 148.10(d), 243(f)(4).

Burden on People to Prove Arrest Lawful ▶ See *People v. Castain* (1981) 122 Cal.App.3d 138, 145.

Unlawful Detention or Arrest ▶ See *Franklin v. Riverside County* (1997) 971 F.Supp. 1332, 1335–1336 [unlawful arrest if officer uses excessive force]; *Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1409 [excessive force by officer not within duties].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Governmental Authority, § 21, pp. 1107–1108.

LESSER INCLUDED OFFENSES

Misdemeanor Resisting Arrest ▶ Pen. Code, § 148(a)(1).

RELATED ISSUES

Exclusions

Penal Code section 148.10 “does not apply to conduct that occurs during labor picketing, demonstrations, or disturbing the peace.” (Pen. Code, § 148.10(c).)

STAFF NOTES

Elements

Penal Code section 148.10 provides:

(a) Every person who willfully resists a peace officer in the discharge or attempt to discharge any duty of his or her office or employment and whose willful resistance proximately causes death or serious bodily injury to a peace officer shall be punished by imprisonment in the state prison for two, three, or four years, or by a fine of not less than one thousand dollars (\$1,000) or more than ten thousand dollars (\$10,000), or by both that fine and imprisonment, or by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment.

(b) For purposes of subdivision (a), the following facts shall be found by the trier of fact:

(1) That the peace officer's action was reasonable based on the facts or circumstances confronting the officer at the time.

(2) That the detention and arrest was lawful and there existed probable cause or reasonable cause to detain.

(3) That the person who willfully resisted any peace officer knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties.

This instruction includes blanks for the name of the officer being resisted, pursuant to a suggestion in *People v. White* (1980) 101 Cal.App.3d 161, 169, fn. 3:

Count 6 (§ 148) failed to name a specific officer as the victim. Under the circumstances of this case, the victim could have been either [officer] Gonzalez or Ciolli. The preferable practice is to allege in the information the specific officer whose lawful authority was resisted. If not so alleged, the jury must specifically be instructed as to the officer involved to assure a defendant, if convicted, that the jury has reached a unanimous verdict. Otherwise the jurors could base their conclusions on defendant's conduct towards one officer with other jurors reaching their conclusion with reference to defendant's conduct in resisting a different officer.

Proximate Causation

The definition of proximate causation is adapted from instruction 728, Homicide: Provocative Act by Defendant.

Serious Bodily Injury

Penal Code section 243(f)(4) defines “serious bodily injury”:

“Serious bodily injury” means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness, concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement.

Peace Officer Defined

Penal Code section 417(e) defines “peace officer” as follows:

(e) As used in this section, "peace officer" means any person designated as a peace officer pursuant to Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2.

The definition of a “sworn officer” is borrowed from instruction 876, Assault With a Deadly Weapon or Force Likely to Produce Great Bodily Injury on Firefighter or Peace Officer.

Lawful Detention or Arrest and Use of Force

For discussion of lawful detention or arrest and the use of force, see the Staff Notes to instruction 900, Taking Firearm or Weapon While Resisting Peace Officer.

910. Assault With Intent to Commit Sex Offense

1 **The defendant is charged [in Count __] with assault with intent to commit**
2 _____ *<specify sex offense listed in Pen. Code, § 220>.*

3
4 **To prove that the defendant is guilty of this crime, the People must prove**
5 **that:**

- 6
7 **1. The defendant willfully did an act that would directly, naturally,**
8 **and probably result in the application of force to a person.**
9
10 **2. A reasonable person, knowing the same facts that the defendant**
11 **knew, would realize that the defendant's act would directly,**
12 **naturally, and probably have that result.**
13
14 **3. When the defendant acted, (he/she) had the present ability to apply**
15 **force to a person.**

16
17 **AND**

- 18
19 **4. When the defendant acted, (he/she) intended to commit _____**
20 ***<specify sex offense listed in Pen. Code, § 220>.***

21
22 **The defendant intended to commit _____ *<specify sex offense listed in***
23 ***Pen. Code, § 220> if the defendant intended to:***

24
25 ***<INSERT THE ELEMENTS FROM THE INSTRUCTION ON THE***
26 ***UNDERLYING SEX OFFENSE.>***

27
28 **The terms *application of force* and *apply force* mean to touch in a harmful or**
29 **offensive manner. The slightest touching can be enough if it is done in a rude**
30 **or angry way. It is enough if the touching makes contact with the person,**
31 **including through his or her clothing. The touching need not cause pain or**
32 **injury of any kind.**

33
34 **[The touching can be done indirectly by causing an object [or someone else]**
35 **to touch the other person.]**

36
37 **No one needs to actually have been injured by defendant's act. But if someone**
38 **was injured, you may consider that fact, along with all the other evidence, in**

39 **deciding whether the defendant committed an assault[, and if so, what kind of**
40 **assault it was].**

41
42 **Someone commits an act *willfully* when he or she does it willingly or on**
43 **purpose.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court has a **sua sponte** duty to give a *Mayberry* consent instruction if the defense is supported by substantial evidence and is consistent with the defense raised at trial. (*People v. May* (1989) 213 Cal.App.3d 118, 124–125; see *People v. Mayberry* (1975) 15 Cal.3d 143; see also Instruction 1100, Rape or Spousal Rape by Force, Fear, or Threats [alternative paragraph on reasonable and actual belief in consent].)

In the blanks, specify the sex offense that the defendant is charged with intending to commit. Included sex offenses are: rape (Pen. Code, § 261); oral copulation (Pen. Code, § 288a [including in-concert offense]); sodomy (Pen. Code, § 286 [including in-concert offense]); sexual penetration (Pen. Code, § 289); rape, spousal rape, or sexual penetration in concert (Pen. Code, § 264.1); and lewd or lascivious acts (Pen. Code, § 288). (See Pen. Code, § 220.)

Insert where indicated the elements of the intended sex offense. (See *People v. May* (1989) 213 Cal.App.3d 118, 129.) For the elements of these sex offenses, see, for example, the following instructions:

Instruction 1100, Rape or Spousal Rape by Force, Fear, or Threats
Instruction 1102, Rape or Spousal Rape in Concert
Instruction 1120, Oral Copulation by Force, Fear, or Threats
Instruction 1122, Oral Copulation in Concert
Instruction 1140, Sodomy by Force, Fear, or Threats
Instruction 1141, Sodomy in Concert
Instruction 1150, Sexual Penetration by Force, Fear, or Threats
Instruction 1151, Sexual Penetration in Concert
Instruction 1220, Lewd or Lascivious Acts: Child Under 14

Related Instructions

For an instruction on simple assault, see Instruction 870, Simple Assault.

AUTHORITY

Elements ▶ Pen. Code, § 220.

Elements for Assault ▶ Pen. Code, § 240; *People v. Williams* (2001) 26 Cal.4th 779, 790.

Court Must Instruct on Elements of Intended Crime ▶ *People v. May* (1989) 213 Cal.App.3d 118, 129.

Intent to Commit Sex Offense ▶ *People v. Meichtry* (1951) 37 Cal.2d 385, 388–389 [assault to commit rape is complete at any moment during the assault when the accused intends to use whatever force may be required].

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 28–34, pp. 654–658.

LESSER INCLUDED OFFENSES

Attempted Sex Offense ▶ Pen. Code, §§ 663, 261, 264.1, 286, 288, 288a, 289; see *People v. De Porceri* (2003) 106 Cal.App.4th 60, 68-69.

Simple Assault ▶ Pen. Code, § 240; see *People v. Greene* (1973) 34 Cal.App.3d 622, 653.

Attempted sexual battery (Pen. Code, §§ 243.4, 664) is not a necessarily included offense of assault to commit rape. (*People v. Dixon* (1999) 75 Cal.App.4th 935, 943.)

There is no crime of attempted assault to commit rape. (*People v. Duens* (1976) 64 Cal.App.3d 310, 314.)

RELATED ISSUES

Abandonment

Assault with intent to commit rape is complete at any point during the incident when the defendant entertains the intent to have sexual intercourse with his victim by force. “It makes no difference whatsoever that he later abandons that intent.” (*People v. Trotter* (1984) 160 Cal.App.3d 1217, 1223; see *People v. Meichtry* (1951) 37 Cal.2d 385, 388–389.)

STAFF NOTES

This instruction incorporates the elements of assault from instruction 870, Simple Assault.

Elements

Penal Code section 220 provides:

Every person who assaults another with intent to commit mayhem, rape, sodomy, oral copulation, or any violation of Section 264.1, 288 or 289 is punishable by imprisonment in the state prison for two, four, or six years.

The court must instruct on the elements of the underlying sex offense, as held in *People v. May* (1989) 213 Cal.App.3d 118, 129 [original italics]:

Where a defendant is charged with assault with intent to commit rape, the jury must first be given CALJIC No. [former] 9.05.5 (listing the elements of this crime [now see 9.09]) followed by CALJIC Nos. 9.00 *and* 10.00 defining the crimes of assault and rape, respectively. [Citations.] In giving only CALJIC Nos. 9.05.5 and 9.00 without giving 10.00, the court's instructions were clearly inadequate.

In a case involving a charge of assault with intent to commit forcible oral copulation, the court in *People v. Elam* (2001) 91 Cal.App.4th 298, 306–307, held that the trial court did not err in failing to instruct sua sponte on the meaning of force:

The force necessary in sexual offense cases is " 'physical force substantially different from or substantially in excess of that required' " for the commission of the sexual act. [Citations omitted.] One nonlegal meaning of force is "to press, drive, attain to, or effect as indicated *against resistance* . . . by some positive *compelling* force or action." (Webster's 3d New Internat. Dict. (1993) p. 887, col. 2, italics added.) Another is "to achieve or win by strength in struggle or violence." (*Ibid.*) These definitions do not differ in any significant degree from the legal definition. It thus is doubtful whether the court ever has a sua sponte duty to define "force" in a sexual offense case containing the element that it be accomplished against the will of the victim. (But see *People v. Pitmom* (1985) 170 Cal.App.3d 38, 52. . .)

In any event, defendant was not charged with forcible oral copulation but with assault with *intent* to commit forcible oral copulation. It is settled that " 'to support a conviction for . . . [such an offense], the prosecution must

prove the assault and an intent on the part of the defendant to use whatever force is required to complete the sexual act against the will of the victim." ' " [Citation omitted.] The jury therefore was not charged with determining whether defendant applied physical force substantially different from or greater than that necessary to obtain oral copulation, but only with determining whether his acts demonstrated an intent to use that degree of force necessary to complete the act against [the victim's] will. For this reason, too, no special instruction on force was necessary.

But see *People v. Griffin* (2002) 100 Cal.App.4th 917, 928, 929–930, in relation to a charge of forcible rape of a young woman who was 16–17 years old:

To compound the problem, the jury in the present case was provided no guidance regarding the meaning of the term "force" in a prosecution for forcible rape. The trial court defined the terms "menace" and "duress" but failed to provide the jury with a definition of "force" despite the fact the prosecution relied solely on a "force" theory for the rape conviction. Because the jury was not informed "force" in this context requires evidence of force substantially different from or greater than that necessary to accomplish sexual penetration, the jury was free to consider even minimal physical contact, and even physical contact virtually inherent in the act itself, as sufficient force for a conviction of forcible rape.

. . .

The court did not provide the jury with a definition of "force" although in this context the term "force" has a "specialized meaning not readily known to the average lay juror" . . . Thus, given the lack of guidance and the prosecutor's closing argument, it is likely the jury voted for conviction without considering whether the evidence of touching in this case constituted "force" substantially different from or greater than that necessary to commit the act of sexual intercourse itself.

The Supreme Court granted review in *People v. Griffin* (2002) S109734.

Lesser Included Offenses

People v. Deporceri (2003, H023851) __ Cal.App.4th __:

We conclude that an assault with intent to commit a violation of [Penal Code] section 288 necessarily involves an attempt to commit a lewd or lascivious act on a child under the age of 14. Thus, defendant's prior conviction qualified as a serious felony under [Penal Code] section 1192.7, subdivision (c)(39) [that is, a strike under the three strikes statutes].

911. Assault With Intent to Commit Mayhem

1 **The defendant is charged [in Count __] with assault with intent to commit**
2 **mayhem.**

3
4 **To prove that the defendant is guilty of this crime, the People must prove**
5 **that:**

- 6
7 **1. The defendant willfully did an act that would directly, naturally,**
8 **and probably result in the application of force to a person.**
9
10 **2. A reasonable person, knowing the same facts that the defendant**
11 **knew, would realize that the defendant's act would directly,**
12 **naturally, and probably have that result.**
13
14 **3. When the defendant acted, (he/she) had the present ability to apply**
15 **force to a person.**

16
17 **AND**

- 18
19 **4. When the defendant acted, (he/she) intended to commit mayhem.**
20

21 **The defendant intended to commit mayhem if (he/she) intended to unlawfully**
22 **and maliciously:**

23
24 **[1. Remove a part of someone's body.]**

25
26 **[2. Disable or make useless a part of someone's body.]**

27
28 **[3. Permanently disfigure someone.]**

29
30 **[4. Cut or disable someone's tongue.]**

31
32 **[5. Slit someone's (nose[,]/ear[,]/ [or] lip).]**

33
34 **[OR]**

35
36 **[6. Put out someone's eye or injure someone's eye in a way that**
37 **significantly reduced (his/her) ability to see.]**
38

39 The terms *application of force* and *apply force* mean to touch in a harmful or
40 offensive manner. The slightest touching can be enough if it is done in a rude
41 or angry way. It is enough if the touching makes contact with the person,
42 including through his or her clothing. The touching need not cause pain or
43 injury of any kind.

44
45 [The touching can be done indirectly by causing an object [or someone else]
46 to touch the other person.]

47
48 No one needs to actually have been injured by defendant's act. But if someone
49 was injured, you may consider that fact, along with all the other evidence, in
50 deciding whether the defendant committed an assault[, and if so, what kind of
51 assault it was].

52
53 Someone commits an act *willfully* when he or she does it willingly or on
54 purpose.

55
56 Someone acts *maliciously* when he or she intentionally does a wrongful act or
57 when he or she acts with the intent to annoy or injure someone else.

58
59 [A disfiguring injury may be *permanent* even if it can be repaired by medical
60 procedures.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Depending on the evidence, select the appropriate elements of mayhem. (See *People v. May* (1989) 213 Cal.App.3d 118, 129 [in context of assault to commit rape].) See generally Instruction 915, Mayhem.

The last bracketed sentence may be given on request if there is evidence of a disfiguring injury that may be repaired by medical procedures. (See *People v. Hill* (1994) 23 Cal.App.4th 1566, 1574–1575 [not error to instruct that injury may be permanent even though cosmetic repair may be medically feasible].)

Related Instructions

Instruction 870, Simple Assault

AUTHORITY

Elements ▶ Pen. Code, § 220.

Elements for Assault ▶ Pen. Code, § 240; *People v. Williams* (2001) 26 Cal.4th 779, 790.

Elements for Mayhem ▶ Pen. Code, § 203.

Court Must Instruct on Elements of Intended Crime ▶ *People v. May* (1989) 213 Cal.App.3d 118, 129 [in context of assault to commit rape].

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 28–34, pp. 654–658.

LESSER INCLUDED OFFENSES

Attempted Mayhem ▶ Pen. Code, §§ 663, 203.

Simple Assault ▶ Pen. Code, § 240; see *People v. Greene* (1973) 34 Cal.App.3d 622, 653 [in context of charged assault with intent to commit rape].

There is no crime of attempted assault to commit an offense. (See *People v. Duens* (1976) 64 Cal.App.3d 310, 314 [in context of assault to commit rape].)

RELATED ISSUES

Abandonment

An assault with intent to commit another crime is complete at any point during the incident when the defendant entertains the intent to commit the crime. “It makes no difference whatsoever that he later abandons that intent.” (See *People v. Trotter* (1984) 160 Cal.App.3d 1217, 1223; *People v. Meichtry* (1951) 37 Cal.2d 385, 388–389 [both in context of assault to commit rape].)

STAFF NOTES

This instruction incorporates the elements of assault from instruction 870, Simple Assault, and the elements of mayhem from instruction 941, Mayhem.

Elements

Penal Code section 220 provides:

Every person who assaults another with intent to commit mayhem, rape, sodomy, oral copulation, or any violation of Section 264.1, 288 or 289 is punishable by imprisonment in the state prison for two, four, or six years.

The court must instruct on the elements of the underlying offense, as held in *People v. May* (1989) 213 Cal.App.3d 118, 129 [in context of assault with intent to commit rape]:

Where a defendant is charged with assault with intent to commit rape, the jury must first be give CALJIC No. [former] 9.05.5 (listing the elements of this crime [now see 9.09]) followed by CALJIC Nos. 9.00 *and* 10.00 defining the crimes of assault and rape, respectively. [Citations.] In giving only CALJIC Nos. 9.05.5 and 9.00 without giving 10.00, the court's instructions were clearly inadequate.

915. Mayhem

1 **The defendant is charged [in Count ____] with mayhem.**

2
3 **To prove that the defendant is guilty of mayhem, the People must prove that the**
4 **defendant unlawfully and maliciously:**

5
6 **[1. Removed a part of someone's body.]**

7
8 **[2. Disabled or made useless a part of someone's body.]**

9
10 **[3. Permanently disfigured someone.]**

11
12 **[4. Cut or disabled someone's tongue.]**

13
14 **[5. Slit someone's (nose[,]/ear[,]/ [or] lip).]**

15
16 **[OR]**

17
18 **[6. Put out someone's eye or injured someone's eye in a way that significantly**
19 **reduced (his/her) ability to see.]**

20
21 **Someone acts *maliciously* when he or she intentionally does a wrongful act or when**
22 **he or she acts with the intent to annoy or injure someone else.**

23
24 **[A disfiguring injury may be *permanent* even it can be repaired by medical**
25 **procedures.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The last bracketed sentence may be given on request if there is evidence of a disfiguring injury that may be repaired by medical procedures. (See *People v. Hill* (1994) 23 Cal.App.4th 1566, 1574–1575 [not error to instruct that injury may be permanent even though cosmetic repair may be medically feasible].)

Related Instructions

Instruction 732, Felony Murder: Murder by Mayhem

AUTHORITY

Elements ▶ Pen. Code, § 203.

Malicious Defined ▶ Pen. Code, § 7(4); *People v. Lopez* (1986) 176 Cal.App.3d 545, 550.

Disabled ▶ See, e.g., *People v. Thomas* (1979) 96 Cal.App.3d 507, 512 [serious ankle injury lasting over six months].

General Intent Crime ▶ *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1226; *People v. Sekona* (1994) 27 Cal.App.4th 443, 453.

Permanent Disfigurement ▶ *People v. Hill* (1994) 23 Cal.App.4th 1566, 1571; *People v. Goodman* (1978) 84 Cal.App.3d 621, 624; see also *People v. Newble* (1981) 120 Cal.App.3d 444, 451 [head is member of body for purposes of disfigurement].

Put Out Eye ▶ *People v. Dennis* (1985) 169 Cal.App.3d 1135, 1138; *People v. Green* (1976) 59 Cal.App.3d 1, 3–4; *People v. Nunes* (1920) 47 Cal.App. 345, 350.

Slit Lip ▶ *People v. Caldwell* (1984) 153 Cal.App.3d 947, 952 [defendant bit through victim's lower lip].

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 84–86, pp. 700–703.

LESSER INCLUDED OFFENSES

Attempted Mayhem ▶ Pen. Code, §§ 663, 203.

Assault ▶ Pen. Code, § 240; see *People v. De Angelis* (1979) 97 Cal.App.3d 837, 841 [mayhem occurred during continuing assault].

Battery ▶ Pen. Code, § 242.

RELATED ISSUES

Disfigurement

Disfigurement constitutes mayhem “only when the injury is permanent.” (*People v. Goodman* (1978) 84 Cal.App.3d 621, 624; *People v. Hill* (1994) 23 Cal.App.4th 1566, 1571.) However, the “possibility that a victim’s disfigurement might be alleviated through reconstructive surgery is no bar to a finding of ‘permanent’ injury.” (*People v. Williams* (1996) 46 Cal.App.4th 1767, 1774.) “We . . . reject [the] contention that evidence of medical alleviation may be used in a mayhem trial to prove an injury, permanent by its nature, may be corrected by medical procedures.” (*People v. Hill* (1994) 23 Cal.App.4th 1566, 1574.) “The law of mayhem . . . protects the integrity of the victim’s person.” (*People v. Page* (1980) 104 Cal.App.3d 569, 578.)

“The fact that [disfiguring injuries] are on a normally unexposed portion of [a] body does not render them any less significant.” (*People v. Keenan* (1991) 227 Cal.App.3d 26, 36 [burns inflicted on victim’s breasts by a cigarette].)

Imperfect Self-Defense Not Available

“[A]part from the *McKelvy* lead opinion, there is no authority to support [the] claim that the mere use of the term ‘malicious’ in section 203 requires a court to instruct a jury that an actual but unreasonable belief will negate the malice required to convict for mayhem . . . [Mayhem] involves a different requisite mental state and has no statutory history recognizing a malice aforethought element or the availability of the *Flannel* defense.” (*People v. Sekona* (1994) 27 Cal.App.4th 443, 457; contra, *People v. McKelvy* (1987) 194 Cal.App.3d 694, 702–704 (lead opn. of Kline, P.J.).)

Victim Must Be Alive

A victim of mayhem must be alive at the time of the act. (*People v. Kraft* (2000) 23 Cal.4th 978, 1058; see *People v. Jentry* (1977) 69 Cal.App.3d 615, 629.)

STAFF NOTES

Elements

Penal Code section 203 defines the crime of mayhem:

Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem.

People v. Newble (1981) 120 Cal.App.3d 444, 451:

Although it is apparent section 203 contains verbal vestiges of English Common law and the Coventry Act, “the modern rationale of the crime may be said to be the preservation of the natural completeness and normal appearance of the human face and body . . .”

Instruction 726, Felony Murder: Murder by Mayhem, sets forth the elements of mayhem in a somewhat more condensed fashion. Instruction 915 separates out the specific acts of mayhem.

Permanent Disfiguring

People v. Hill (1994) 23 Cal.App.4th 1566, 1571:

To prove mayhem based on a disfiguring injury, the injury must be permanent. (Citations [to Perkins & Boyce, LaFave & Scott, and Witkin & Epstein.]

Put Out an Eye

People v. Nunes (1920) 47 Cal.App. 345, 350:

What [section 203] obviously means by the expression or phrase, “put out the eye,” is that the eye has been injured to such an extent that its possessor cannot use it for the ordinary and usual practical purposes of life.

People v. Dennis (1985) 169 Cal.App.3d 1135, 1138:

Mayhem is committed when the inflicted injury not only completely destroys the victim’s eyesight (citation), but also when it causes impairment less than total blindness.

916. Aggravated Mayhem

1 **The defendant is charged [in Count ____] with aggravated mayhem.**

2
3 **To prove that the defendant is guilty of this crime, the People must prove that:**

- 4
- 5 **1. The defendant unlawfully (disabled or disfigured someone permanently/**
 - 6 **[or] deprived someone else of a limb, organ, or part of (his/her) body).**
 - 7
 - 8 **2. When the defendant acted, (he/she) intended to (permanently disable or**
 - 9 **disfigure the other person/ [or] deprive the other person of a limb, organ,**
 - 10 **or part of (his/her) body).**
 - 11

12 **AND**

- 13
- 14 **3. Under the circumstances, the defendant’s act showed extreme indifference**
- 15 **to the physical or psychological well-being of the other person.**
- 16

17 **[A disfiguring injury may be *permanent* even if it can be repaired by medical**

18 **procedures.]**

19

20 **[The People do not have to prove that the defendant intended to kill.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

In element 1, give the first option if the defendant was prosecuted for permanently disabling or disfiguring the victim. Give the second option if the defendant was prosecuted for depriving someone of a limb, organ, or body part. (See Pen. Code, § 205.)

The bracketed sentence regarding “permanent injury” may be given on request if there is evidence that the injury may be repaired by medical procedures. (*People v. Hill* (1994) 23 Cal.App.4th 1566, 1574–1575 [not error to instruct that an injury may be permanent even though cosmetic repair may be medically feasible].)

The final bracketed sentence may be given on request of the prosecution when there is no evidence or conflicting evidence that the defendant intended to kill someone. (See Pen. Code, § 205.)

Related Instructions

Instruction 732, Felony Murder: Murder by Mayhem

AUTHORITY

Elements ▶ Pen. Code, § 205.

Permanent Disability ▶ See, e.g., *People v. Thomas* (1979) 96 Cal.App.3d 507, 512 [serious ankle injury lasting over six months].

Permanent Disfigurement ▶ See *People v. Hill* (1994) 23 Cal.App.4th 1566, 1571; see also *People v. Newble* (1981) 120 Cal.App.3d 444, 451 [head is member of body for purposes of disfigurement].

Specific Intent to Cause Maiming Injury ▶ *People v. Ferrell* (1990) 218 Cal.App.3d 828, 833; *People v. Lee* (1990) 220 Cal.App.3d 320, 324–325.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 87, pp. 703–704.

LESSER INCLUDED OFFENSES

Attempted Aggravated Mayhem ▶ Pen. Code, §§ 663, 205.

Assault ▶ Pen. Code, § 240.

Battery ▶ Pen. Code, § 242.

RELATED ISSUES

Victim Must Be Alive

A victim of mayhem must be alive at the time of the act. (*People v. Kraft* (2000) 23 Cal.4th 978, 1058; see *People v. Jentry* (1977) 69 Cal.App.3d 615, 629.)

STAFF NOTES

Elements

Penal Code section 205 defines the crime of aggravated mayhem:

A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body. For purposes of this section, it is not necessary to prove an intent to kill. Aggravated mayhem is a felony punishable by imprisonment in the state prison for life with the possibility of parole.

Specific Intent

People v. Ferrell (1990) 218 Cal.App.3d 828, 833, 835:

When compared to the language of section 203, the unambiguous language of section 205 compels the conclusion that the specific intent to cause the maiming injury is an element of aggravated mayhem. . . . [T]he standards articulated in cases involving felony-murder mayhem are instructive here. Evidence which shows no more than an “indiscriminate attack” is insufficient to prove the specific intent to commit mayhem under section 203 [for felony-murder mayhem]. (Citations.) Furthermore, specific intent to maim may not be inferred solely from evidence that the injury inflicted actually constitutes mayhem; instead, there must be other facts and circumstances which support an inference of intent to maim rather than to attack indiscriminately.

An intent to shoot and maim or *kill* was found to be sufficient in *People v. Oates* (2002, E029354) __ Cal.App.4th __:

[T]here was sufficient evidence [the defendant] intended to shoot and maim or kill an NSO [gang] member, and targeted Barrera for that purpose. [¶] Substantial evidence supported defendant’s conviction for aggravated mayhem.

920. Child Abuse Likely to Produce Great Bodily Harm or Death

1 **The defendant is charged [in Count ____] with child abuse likely to produce**
2 **great bodily harm or death.**

3
4 **To convict the defendant of this crime, the People must prove that:**

5
6 *<Alternative A—inflicted pain>*

7 **[1. The defendant willfully inflicted unjustifiable physical pain or**
8 **mental suffering on a child.]**

9
10 *<Alternative B—caused or permitted to suffer pain>*

11 **[1. The defendant willfully caused or permitted a child to suffer**
12 **unjustifiable physical pain or mental suffering.]**

13
14 *<Alternative C—while having custody, caused or permitted to suffer*
15 *injury>*

16 **[1. The defendant, while having care or custody of a child, willfully**
17 **caused or permitted the child’s person or health to be injured.]**

18
19 *<Alternative D—while having custody, caused or permitted to be placed in*
20 *danger>*

21 **[1. The defendant, while having care or custody of a child, willfully**
22 **caused or permitted the child to be placed in a situation where the**
23 **child’s person or health was endangered.]**

24
25 **[AND]**

26
27 **2. The defendant (inflicted pain or suffering on the child/ [or] caused**
28 **or permitted the child to (suffer/ [or] be injured/ [or] be**
29 **endangered)) under circumstances or conditions likely to produce**
30 **great bodily harm or death.**

31
32 **[AND]**

33
34 **[3. The defendant was criminally negligent when (he/she) caused or**
35 **permitted the child to (suffer/ [or] be injured/ [or] be endangered).]**

36
37 **[AND]**

38
39 **4. The defendant did not act while reasonably disciplining a child.]**

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

A *child* is any person under the age of 18 years.

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

Great bodily harm means significant or substantial physical injury.

[*Unjustifiable* physical pain or mental suffering is pain or suffering that is not reasonably necessary or is excessive under the circumstances.]

[*Criminal negligence* involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when:

1. He or she acts in a reckless way that creates a high risk of death or great bodily harm.

AND

2. A reasonable person would have known that acting in that way would create such a risk.

In other words, a person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.]

[A child does not need to actually suffer great bodily harm. But if a child does suffer great bodily harm, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed the offense.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give element 1A if it is alleged that the defendant directly inflicted unjustifiable physical pain or mental suffering. Give element 1B if it is alleged that the defendant caused or permitted a child to suffer. If it is alleged that the defendant had care or custody of a child and caused or permitted the child's person or health to be injured, give element 1C. Finally, give element 1D if it is alleged that the defendant had care or custody of a child and endangered the child's person or health. (See Pen. Code, § 273a(a).)

Give bracketed element 3 and the bracketed definition of "criminally negligent" if element 1B, 1C, or 1D is given alleging that the defendant committed any indirect acts. (See *People v. Valdez* (2002) 27 Cal.4th 778, 788, 789; *People v. Peabody* (1975) 46 Cal.App.3d 43, 48–49.)

Give bracketed element 4 if the evidence raises an issue of defense of disciplining a child. (See Instruction 630, Parental Right to Punish a Child.)

Give on request the bracketed definition of "unjustifiable" physical pain or mental suffering if there is a question about the necessity or degree of pain or suffering. (See *People v. Curtiss* (1931) 116 Cal.App. Supp. 771, 779–780.)

If there is a question about whether a child suffered great bodily harm, give on request the bracketed paragraph stating that a child need not actually suffer great bodily harm. (See *People v. Cortes* (1999) 71 Cal.App.4th 62, 80; *People v. Jaramillo* (1979) 98 Cal.App.3d 830, 835.)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

AUTHORITY

Elements ▶ Pen. Code, § 273a(a); *People v. Cortes* (1999) 71 Cal.App.4th 62, 80; *People v. Smith* (1984) 35 Cal.3d 798, 806.

Child Defined ▶ See Fam. Code, § 6500; *People v. Thomas* (1976) 65 Cal.App.3d 854, 857–858 [in context of Pen. Code, § 273d].

Great Bodily Harm or Injury Defined ▶ Pen. Code, § 12022.7(f); *People v. Cortes* (1999) 71 Cal.App.4th 62, 80.

Willful Defined ▶ Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107; *People v. Vargas* (1988) 204 Cal.App.3d 1455, 1462, 1468–1469.

Criminal Negligence Required for Indirect Conduct ▶ *People v. Valdez* (2002) 27 Cal.4th 778, 788, 789; *People v. Peabody* (1975) 46 Cal.App.3d 43, 47, 48–49; see *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [criminal

negligence for homicide]; *Walker v. Superior Court* (1988) 47 Cal.3d 112, 135.

General Criminal Intent Required for Direct Infliction of Pain or

Suffering ▶ *People v. Sargent* (1999) 19 Cal.4th 1206, 1224; see *People v. Atkins* (1975) 53 Cal.App.3d 348, 361; *People v. Wright* (1976) 60 Cal.App.3d 6, 14.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 159–163, pp. 453–458.

COMMENTARY

Willful Violation

Any violation of Penal Code section 273a(a) must be willful. (*People v. Smith* (1984) 35 Cal.3d 798, 806; *People v. Cortes* (1999) 71 Cal.App.4th 62, 80; but see *People v. Valdez* (2002) 27 Cal.4th 778, 789 [the prong punishing a *direct infliction* of unjustifiable physical pain or mental suffering does not expressly require that the conduct be willful].) Following *Smith* and *Cortes*, the committee has included “willfully” in element 1A regarding direct infliction of abuse until there is further guidance from the courts.

LESSER INCLUDED OFFENSES

Attempted Child Abuse ▶ Pen. Code, §§ 664, 273a(a).

Misdemeanor Child Abuse ▶ Pen. Code, § 273a(b).

RELATED ISSUES

Care or Custody

“The terms ‘care or custody’ do not imply a familial relationship but only a willingness to assume duties correspondent to the role of a caregiver.” (*People v. Toney* (1999) 76 Cal.App.4th 618, 621–622 [quoting *People v. Cochran* (1998) 62 Cal.App.4th 826, 832].)

Prenatal Conduct

Penal Code section 273a does not apply to prenatal conduct endangering an unborn child. (*Reyes v. Superior Court* (1977) 75 Cal.App.3d 214, 217–218, 219.)

Unanimity on Particular Acts Not Required

Felony child abuse can be charged as a continuous course of conduct crime. When a single course of conduct is established, the jury should not be instructed that they need to agree unanimously that the defendant committed any particular act or acts. The jury need only agree unanimously that the defendant engaged in the

prohibited conduct. (*People v. Culuko* (2000) 78 Cal.App.4th 307, 325; *People v. Vargas* (1988) 204 Cal.App.3d 1455, 1462–1463, 1464; *People v. Napoles* (2002) 104 Cal.App.4th 108, 115-117 [unanimity instruction not required when evidence merely presents possibility that jury may disagree on exact way single discrete crime was committed].) If it is appropriate to inform the jury that unanimity is not required when a course of conduct is prosecuted, *People v. Napoles, supra*, 104 Cal.App.4th at p.120, footnote 8, provides suggested language.

STAFF NOTES

Elements

Penal Code section 273a(a) defines the crime of neglect or mistreatment of a child as follows:

(a) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years.

“For a defendant to be guilty of violating section 273a, subdivision (a), his conduct must be willful and it must be committed under circumstances ‘likely to produce great bodily harm or death.’” (*People v. Cortes* (1999) 71 Cal.App.4th 62, 80; *People v. Smith* (1984) 35 Cal.3d 798, 806.)

The court in *People v. Sargent* (1999) 19 Cal.4th 1206, 1215, stated that section 273a(a) “is an omnibus statute that proscribes essentially four branches of conduct”: [1] willfully causing or permitting any child to suffer, or [2] inflicting thereon unjustifiable physical pain or mental suffering, or [3] while having care or custody of any child, willfully causing or permitting the child’s person or health to be injured, or [4] willfully causing or permitting a child to be placed in a situation that endangers the child’s person or health.

Section 273a(a) states that “[a]ny person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering” Justice Mosk, in his concurrence in *Sargent*, construes the underlined phrase to mean that the statute prohibits “willfully causing or permitting any child to suffer unjustifiable physical pain or suffering,” rejecting the argument that this phrase simply prohibits “willfully causing or permitting any child to suffer.” (*Sargent*, *supra*, 19 Cal.4th 1206, 1226, fn. 1 (conc. of Mosk, J.); see also *People v. Vargas* (1988) 204 Cal.App.3d 1455, 1465 [describing violation to include directly inflicting or willfully permitting the infliction of unjustifiable physical pain or mental suffering on a child].) Instruction 920 adheres to the Mosk construction in element 1B.

Mens Rea

The court in *People v. Sargent* (1999) 19 Cal.4th 1206, 1216, stated it had “not previously addressed the question of the appropriate mens rea for direct infliction of abuse cases under [the second branch of] section 273a.” The court held as follows (*id.* at p. 1224):

[We] conclude that when the conduct at issue involves the direct infliction of unjustifiable physical pain or mental suffering on a child, criminal negligence is not an element of the offense. Rather, the defendant must have a mens rea of general criminal intent to commit the proscribed act.

The court noted that “the issue of what mens rea is required for the other three branches . . . is not before us.” (*Id.* at p. 1216, fn. 5.) The court finally did decide in *People v. Valdez* (2002) 27 Cal.4th 778, 788, 789, 790, that the appropriate mens rea for felony child endangerment is criminal negligence:

[F]or 25 years, the lower courts have identified criminal negligence as the relevant standard of culpability for section 273a, subdivision (a) felony child endangerment, and this court has applied that same standard. [Citations omitted.] Absent any intervening change in the relevant statutory language, this weight of consistent authority is persuasive. . . . [C]riminal negligence is the appropriate standard when the act is intrinsically lawful, such as leaving an infant with a babysitter, but warrants criminal liability because the surrounding circumstances present a high risk of serious injury. . . . We do not think the Legislature’s use of the word “willful” is inconsistent with a criminal negligence standard. We have suggested on at least one occasion that an act or omission amounting to criminal negligence can constitute a willful violation of the law. [Citation omitted.]

The court in *People v. Peabody* (1975) 46 Cal.App.3d 43, 48–49, had decided that a criminal negligence standard of conduct should apply for willfully causing or permitting a child to be placed in a situation endangering a child’s person or health:

[W]e hold that Penal Code section 273a, subdivision (1) [now subdivision (a)] requires proof of criminal negligence which means that the defendant’s conduct must amount to reckless, gross or culpable departure from the ordinary standard of due care; it must be such a departure from what would be the conduct of an ordinarily prudent person under the same circumstances as to be incompatible with a proper regard for human life. [Citations omitted.] [¶] While the trial court instructed the jury in the words of the statute, it failed to instruct on the appropriate standard of conduct proscribed by the statute.

The leading case defining “criminal negligence” is *People v. Penny* (1955) 4 Cal.2d 861, 879–880, which adopted the definition from 26 American Jurisprudence, Homicide, section 210, page 299, as “the standard to be used in California for negligent homicide”:

The negligence must be aggravated, culpable, gross, or reckless, that is, the conduct of the accused must be such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to consequences.

It could be argued that criminal negligence only applies to causing or permitting child endangerment because that was the exact conduct involved in *Valdez* and *Peabody*. (See *People v. Valdez* (2002) 27 Cal.4th 778, 787; *People v. Peabody*, *supra*, 46 Cal.App.3d at pp. 45–46; see also *People v. Kinkead* (2000) 80 Cal.App.4th 1113, 1119–1120 [criminal negligence is required for child endangerment].) *Valdez* and *Sargent* note that other cases involving indirect abuse and child endangerment broadly state that section 273a is a “criminal negligence” statute. (*People v. Valdez*, *supra*, 27 Cal.4th at p. 784; *People v. Sargent*, *supra*, 19 Cal.4th at pp. 1218–1219; see, e.g., *People v. Lee* (1991) 234 Cal.App.3d 1214, 1221; *People v. Rippberger* (1991) 231 Cal.App.3d 1667, 1682; *People v. Odom* (1991) 226 Cal.App.3d 1028, 1032.) Following the reasoning expressed in *Valdez*, element 3 of this instruction applies the criminal negligence standard to (1) causing or permitting a child to suffer physical pain or mental suffering and (2) causing or permitting a child’s person or health to be injured, as well as to (3) child endangerment.

Also note that bracketed element 3 applies the criminal negligence standard to elements 1B–1D without distinguishing whether the defendant “willfully caused or permitted” the child abuse. This is contrary to existing CALJIC No. 9.37, which states, for example, that the People must prove that a person “willfully caused or, as a result of criminal negligence, permitted a child to suffer unjustifiable physical pain or mental suffering.” *Valdez* notes that CALJIC fails to link “willfully” to “criminal negligence,” but found the failure was not prejudicial under the facts of the case. (*People v. Valdez*, *supra*, 27 Cal.4th at p. 792.)

Great Bodily Harm

“Great bodily harm” is defined in *People v. Cortes* (1999) 71 Cal.App.4th 62, 80:

“Great bodily harm refers to significant or substantial injury and does not refer to trivial or insignificant injury.” (CALJIC No. 9.37.) However, there

is no requirement that the victim suffer great bodily harm. (*People v. Jaramillo* (1979) 98 Cal.App.3d 830, 835 . . .)

This definition appears in part to be borrowed from Penal Code section 12022.7(f), which defines “great bodily injury” for purposes of the GBI enhancement:

(f) As used in this section, “great bodily injury” means a significant or substantial physical injury.

921. Assault Causing Death of Child

1 **The defendant is charged [in Count __] with killing a child under the age of 8**
2 **by assaulting the child with force likely to produce great bodily injury.**

3
4 **To prove that the defendant is guilty of this crime, the People must prove**
5 **that:**

6
7 **1. The defendant had care or custody of a child who was under the age**
8 **of 8.**

9
10 **2. The defendant willfully did an act that would directly, naturally,**
11 **and probably result in the application of force to the child.**

12
13 **3. The force used was likely to produce great bodily injury.**

14
15 **4. A reasonable person, knowing the same facts that the defendant**
16 **knew, would realize that the defendant's act would directly,**
17 **naturally, and probably cause great bodily injury.**

18
19 **5. When the defendant acted, (he/she) had the present ability to apply**
20 **force likely to produce great bodily injury to the child.**

21
22 **[AND]**

23
24 **6. The defendant's act caused the child's death.**

25
26 **[AND]**

27
28 **7. When the defendant acted, (he/she) was not reasonably disciplining**
29 **a child.]**

30
31 **Someone commits an act *willfully* when he or she does it willingly or on**
32 **purpose. It is not required that he or she intend to break the law, hurt**
33 **someone else, or gain any advantage.**

34
35 ***Great bodily injury* means significant or substantial physical injury.**

36
37 ***An act causes death* if:**

38
39 **1. The death was the natural and probable consequence of the act.**

40
41 **2. The act was a direct and substantial factor in causing the death.**

42
43 **AND**

44
45 **3. The death would not have happened without the act.**

46
47 **A *substantial factor* is more than a trivial or remote factor. However, it need**
48 **not have been the only factor that caused the death.**

49
50 **[A (parent/guardian/ _____ <insert title of other person legally permitted**
51 **to discipline the child>) is not guilty of _____ <insert crime> if (he/she)**
52 **used justifiable physical force to discipline a child. Physical force is justifiable**
53 **if a reasonable person would find that punishment was necessary under the**
54 **circumstances and that the physical force used was reasonable.**

55
56 **The People have the burden of proving beyond a reasonable doubt that the**
57 **force used was not justifiable. If the People have not met this burden, you**
58 **must find the defendant not guilty of this crime.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

The court also has a **sua sponte** duty to give bracketed element 7 and the final two bracketed paragraphs if the evidence raises the defense of disciplining a child. (See *People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1051.)

Related Instructions

For an instruction on the requirements for assault by force likely to produce great bodily injury, see Instruction 875, Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury.

AUTHORITY

- Elements ▶ Pen. Code, § 273ab; see *People v. Malfavon* (2002) 102 Cal.App.4th 727, 735 [sometimes called “child abuse homicide”].
- Great Bodily Injury Defined ▶ Pen. Code, § 12022.7(f); *People v. Albritton* (1998) 67 Cal.App.4th 647, 658.
- Willful Defined ▶ Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107.
- Force Likely to Produce Great Bodily Injury ▶ *People v. Preller* (1997) 54 Cal.App.4th 93, 97–98 [need not prove that reasonable person would believe force would be likely to result in child’s death].
- General Intent Crime ▶ *People v. Albritton* (1998) 67 Cal.App.4th 647, 658–659.
- Mental State for Assault ▶ *People v. Williams* (2001) 26 Cal.4th 779, 790.
- 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 99, pp. 715–716.

LESSER INCLUDED OFFENSES

- Attempted Assault on Child With Force Likely to Produce Great Bodily Injury ▶ Pen. Code, §§ 664, 273ab.
- Assault ▶ Pen. Code, § 240.
- Assault With Force Likely to Produce Great Bodily Injury ▶ Pen. Code, § 245(a)(1); *People v. Bausta* (2001) 94 Cal.App.4th 370, 392.
- Involuntary manslaughter is not a lesser included offense of Penal Code section 273ab. (*People v. Stewart* (2000) 77 Cal.App.4th 785, 796; *Orlina v. Superior Court* (1999) 73 Cal.App.4th 258, 261–262.)
- Neither murder nor child abuse homicide is a necessarily included offense within the other. (*People v. Malfavon* (2002) 102 Cal.App.4th 727, 743–744.)

RELATED ISSUES

Care or Custody

“The terms ‘care or custody’ do not imply a familial relationship but only a willingness to assume duties correspondent to the role of a caregiver.” (*People v. Cochran* (1998) 62 Cal.App.4th 826, 832.)

STAFF NOTES

Elements

The crime of assaulting a child with force likely to produce great bodily injury resulting in the child's death is defined in Penal Code section 273ab:

Any person who, having the care or custody of a child who is under eight years of age, assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death, shall be punished by imprisonment in the state prison for 25 years to life. Nothing in this section shall be construed as affecting the applicability of subdivision (a) of Section 187 or Section 189.

It is not necessary to prove that a reasonable person would believe the force used would likely result in the child's death, as held in *People v. Preller* (1997) 54 Cal.App.4th 93, 97–98:

If the Legislature had meant for “resulting in the child's death” to modify “great bodily injury,” it would not have placed a comma after “great bodily injury.” . . . Thus, the force must be likely, in the mind of a reasonable person, to produce great bodily [injury] *and* the force must result in the child's death. . . . “[R]esulting in the child's death” does not modify “great bodily injury,” and, therefore, the prosecution need not prove that a reasonable person would believe the means of force would be likely to result in the child's death. [Italics in original.]

Assault With Force Likely to Produce Great Bodily Injury

Elements 2–5 of this instruction incorporate elements from instruction 875, Assault With a Deadly Weapon or Force Likely to Produce Great Bodily Injury, which includes the elements of simple assault.

General Intent

People v. Albritton (1998) 67 Cal.App.4th 647, 658–659:

[Penal Code s]ection 273ab is a general intent crime. The mens rea for the crime is willfully assaulting a child under eight years of age with force that objectively is likely to result in great bodily injury—that is, the assault must be intentional. Whether the force is objectively likely to result in great bodily injury is a question for the trier of fact. . . . It is not required that the actor intend to produce great bodily injury or death, nor is it required that he know or should know the act is intrinsically capable of causing such consequences.

Direct and Concurrent Causes

To define “as a result of” the defendant’s act (see Pen. Code, § 273ab), this instruction incorporates the definitions of direct and concurrent causes from instruction 728, Homicide: Provocative Act by Defendant. This instruction uses the phrase “causes death” in place of “results in death.”

922. Inflicting Physical Punishment on Child

1 **The defendant is charged [in Count __] with inflicting on a child cruel or**
2 **inhuman physical punishment or injury that caused a traumatic condition.**

3
4 **To prove that the defendant is guilty of this crime, the People must prove**
5 **that:**

6
7 **1. The defendant willfully inflicted (cruel or inhuman physical**
8 **punishment/ [and/or] an injury) on a child.**

9
10 **[AND]**

11
12 **2. The (punishment/ [and/or] injury) inflicted by the defendant caused**
13 **a traumatic physical condition to the child.**

14
15 **[AND]**

16
17 **3. When the defendant acted, (he/she) was not reasonably disciplining**
18 **a child.]**

19
20 **Someone commits an act *willfully* when he or she does it willingly or on**
21 **purpose. It is not required that he or she intend to break the law, hurt**
22 **someone else, or gain any advantage.**

23
24 **A *child* is any person under the age of 18.**

25
26 **A *traumatic physical condition* is a wound or other abnormal bodily condition**
27 **resulting from the application of force.**

28
29 **A (punishment/ [and/or] injury) *caused* a traumatic physical condition if:**

30
31 **1. The traumatic condition was the natural and probable consequence**
32 **of the (punishment/ [and/or] injury).**

33
34 **2. The (punishment/ [and/or] injury) was a direct and substantial**
35 **factor in causing the condition.**

36
37 **AND**
38

39 **3. The condition would not have happened without the (punishment/**
40 **[and/or] injury).**

41
42 **A *substantial factor* is more than a trivial or remote factor. However, it need**
43 **not have been the only factor that caused the traumatic condition.**

44
45 **[A (parent/guardian/ _____ <insert title of other person legally permitted**
46 **to discipline the child>) is not guilty of _____ <insert crime> if (he/she)**
47 **used justifiable physical force to discipline a child. Physical force is justifiable**
48 **if a reasonable person would find that punishment was necessary under the**
49 **circumstances and that the physical force used was reasonable.**

50
51 **The People have the burden of proving beyond a reasonable doubt that the**
52 **force used was not justifiable. If the People have not met this burden, you**
53 **must find the defendant not guilty of this crime.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

The court also has a **sua sponte** duty to give bracketed element 3 and the final two bracketed paragraphs if the evidence raises the defense of disciplining a child. (See *People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1051.)

AUTHORITY

Elements ▶ Pen. Code, § 273d(a).

Willful Defined ▶ Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

Child Defined ▶ *People v. Thomas* (1976) 65 Cal.App.3d 854, 857–858 [victim's size and age relevant to reasonableness of corporal punishment]; see Fam. Code, § 6500.

Duty to Define Traumatic Condition ▶ *People v. Burns* (1948) 88 Cal.App.2d 867, 873–874.

General Intent Crime ▶ *People v. Atkins* (1975) 53 Cal.App.3d 348, 358.

Traumatic Condition Defined ▶ *People v. Thomas* (1976) 65 Cal.App.3d 854, 857; *People v. Stewart* (1961) 188 Cal.App.2d 88, 91; see *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 951–953 [in context of Pen. Code, § 273.5].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 164, 165, pp. 459–460.

LESSER INCLUDED OFFENSES

Attempted Infliction of Corporal Punishment ▶ Pen. Code, §§ 664, 273d.

Simple Assault ▶ Pen. Code, § 240.

Simple Battery ▶ Pen. Code, § 242; see *People v. Sargent* (1999) 19 Cal.4th 1206, 1220; *People v. Stewart* (1961) 188 Cal.App.2d 88, 89.

Willfully causing or permitting a child to suffer, or willfully inflicting on a child, unjustifiable physical pain or mental suffering under circumstances other than those likely to produce great bodily harm or death (Pen. Code, § 273a(b)) is not a lesser included offense of Penal Code section 273d. (See *People v. Lofink* (1988) 206 Cal.App.3d 161, 166.)

RELATED ISSUES

Spanking

It is not unlawful for a parent to spank a child for disciplinary purposes with an object other than the hand. The punishment, however, must be necessary and not excessive in relation to the individual circumstances. (80 Ops.Cal.Atty.Gen. 203 (1997).)

STAFF NOTES

Elements

Penal Code section 273d defines this offense:

(a) Any person who willfully inflicts upon a child any cruel or inhuman corporal punishment or an injury resulting in a traumatic condition is guilty of a felony and shall be punished by imprisonment in the state prison for two, four, or six years, or in a county jail for not more than one year, by a fine of up to six thousand dollars (\$6,000), or by both that imprisonment and fine.

Section 273d(a) is applied to any person who (a) willfully inflicts on a child (b) any cruel or inhuman corporal punishment *or* an injury (c) that results in a traumatic condition. (See, e.g., *Stewart, supra*, 188 Cal.App.2d at p. 91; *Atkins, supra*, 53 Cal.App.3d at p. 358.)

Corporal Punishment; Cruel and Inhuman

This instruction uses the term “physical punishment” in place of the statutory phrase “corporal punishment.” The Oxford English Dictionary defines “corporal punishment” as follows:

[P]unishment inflicted on the body; originally including death, mutilation, branding, bodily confinement, irons, the pillory, etc. (as opposed to a fine or punishment in estate or rank). In 19th c. usually confined to flogging or similar infliction of bodily pain.

The phrase “cruel and inhuman corporal punishment” is not vague, as discussed in *People v. Thomas* (1976) 65 Cal.App.3d 854, 857:

“Corporal punishment” poses no problem of definition. The terms “cruel and inhuman” are also capable of clear definition and are no more vague than the phrase “cruel and unusual” as used in the Constitution itself.

General Intent

An offense under Penal Code section 273d(a) is a general intent crime, as held in *People v. Atkins* (1975) 53 Cal.App.3d 348, 358:

There need not be found a deliberate intent to cause a traumatic condition, but only the more general intent to inflict upon a child any cruel or inhuman corporal punishment or injury.

Traumatic Condition Defined

The duty to define “traumatic condition” was recognized in *People v. Burns* (1948) 88 Cal.App.2d 867, 873–874:

We are of the opinion that the court should have given, on its own motion, an instruction to the jury defining and advising them as to what, in contemplation of law, constitutes “a traumatic condition.” “Trauma” has been defined as: “An abnormal condition of the living body produced by violence as distinguished from that produced by poisons, zymotic infection, bad habits, and other less evident causes; an injury or wound; any injury to the body caused by external violence; a wound; a wound or injury directly produced by causes external to the body; also the violence producing a wound or injury, the word generally implying physical force.” (63 C.J. 804.) “Traumatic” has been defined as: “A term applied to wounds, caused by or resulting from a wound or any external injury, having to do with a wound or injury, of or pertaining to wounds, pertaining to or due to a wound or injury.” (63 C.J. 804.) (See, also, 42 Words and Phrases perm. ed., pp. 387-391.)

Later courts have used parts of the *Burns*’ definitions. See, e.g., *People v. Stewart* (1961) 188 Cal.App.2d 88, 91:

For purposes of this statute [Pen. Code, § 273d], traumatic condition has been defined as a wound or other abnormal bodily condition resulting from the application of some external force.

Direct and Concurrent Causes

To define “as a result of” punishment or injury inflicted by the defendant, this instruction incorporates a shortened version of the definitions of direct and concurrent causes from instruction 728, Homicide: Provocative Act by Defendant. This instruction uses the phrase “causes a traumatic condition” in place of “results in a traumatic condition.”

923. Abuse of Elder or Dependent Adult Likely to Produce
Great Bodily Harm or Death

The defendant is charged [in Count __] with (elder/dependent adult) abuse likely to produce great bodily harm or death.

To convict the defendant of this crime, the People must prove that:

<Alternative A—inflicted pain>

[1. The defendant willfully inflicted unjustifiable physical pain or mental suffering on _____ *<insert name or description of elder or dependent adult>.*

<Alternative B—caused or permitted to suffer pain>

[1. The defendant willfully caused or permitted _____ *<insert name or description of elder or dependent adult>* to suffer unjustifiable physical pain or mental suffering.]

<Alternative C—while having custody, caused or permitted to be injured>

[1. The defendant, while having care or custody of _____ *<insert name or description of elder or dependent adult>* willfully caused or permitted (his/her) person or health to be injured.]

<Alternative D—while having custody, caused or permitted to be placed in danger>

[1. The defendant, while having care or custody of _____ *<insert name or description of elder or dependent adult>* willfully caused or permitted (him/her) to be placed in a situation where (his/her) person or health was endangered.]

2. The defendant (inflicted suffering on _____ *<insert name or description of elder or dependent adult>*/ [or] caused or permitted _____ *<insert name of elder or dependent adult>* to (suffer/ [or] be injured/ [or] be endangered)) under circumstances or conditions likely to produce great bodily harm or death.

[AND]

3. _____ *<insert name or description of elder or dependent adult>* (is/was) (an elder/ [or] [a] dependent adult).

39 [AND]

40
41 **[4. When the defendant (inflicted suffering on _____ <insert name**
42 **or description of elder or dependent adult>/ [or] caused or permitted**
43 **_____ <insert name or description of elder or dependent adult>**
44 **to suffer), the defendant knew or should have known that (he/she)**
45 **was (an elder/ [or] [a] dependent adult).]**

46
47 [AND]

48
49 **[5. The defendant had a legal duty to supervise and control the conduct**
50 **of the person[s] who caused or inflicted unjustifiable physical pain**
51 **or mental suffering on _____ <insert name or description of**
52 **elder or dependent adult>, but failed to supervise or control that**
53 **conduct.]**

54
55 [AND]

56
57 **6. The defendant was criminally negligent when (he/she) caused or**
58 **permitted _____ <insert name or description of elder or**
59 **dependent adult> to (suffer/ [or] be injured/ [or] be endangered).]**

60
61 **Someone commits an act *willfully* when he or she does it willingly or on**
62 **purpose. It is not required that he or she intend to break the law, hurt**
63 **someone else, or gain any advantage.**

64
65 ***Great bodily harm* means significant or substantial physical injury.**

66
67 **[An *elder* is someone who is at least 65 years old.]**

68
69 **[A *dependent adult* is someone who is between 18 and 64 years old and has**
70 **physical or mental limitations that restrict his or her ability to carry out**
71 **normal activities or to protect his or her rights.] [This definition includes an**
72 **adult who has physical or developmental disabilities or whose physical or**
73 **mental abilities have decreased because of age.] [A *dependent adult* is also**
74 **someone between 18 and 64 years old who is an inpatient in a [psychiatric]**
75 **health facility [or chemical dependency recovery hospital] that provides 24-**
76 **hour inpatient care.]**

77
78 **[*Unjustifiable* physical pain or mental suffering is pain or suffering that is not**
79 **reasonably necessary or is excessive under the circumstances.]**

[A person who does not have care or custody of (an elder/a dependent adult) may still have a *legal duty to supervise and control the conduct of a third person* who can inflict abuse on the (elder/dependent adult) if the person has a special relationship with the third person. A special relationship is created, for example, when (1) a person takes charge of a third person whom (he/she) knows or should know is likely to cause bodily harm to others if not controlled, and (2) the person has the ability to control the third person's conduct.]

[*Criminal negligence* involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when:

1. He or she acts in a reckless way that creates a high risk of death or great bodily harm.

AND

2. A reasonable person would have known that acting in that way would create such a risk.

In other words, a person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.]

[(An elder/A dependent adult) does not need to actually suffer great bodily harm. But if (an elder/a dependent adult) does suffer great bodily harm, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed the offense.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

[It is also alleged [in Count __] that (_____ <insert name of elder or dependent adult> suffered great bodily injury/the defendant proximately caused the death of _____ <insert name of elder or dependent adult>) and that _____ <insert name of elder or dependent adult> was _____ <insert age of elder or dependent adult> years old. [Great bodily injury means significant or substantial physical injury.] The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this additional allegation has not been proved.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

Give element 1A if it is alleged that the defendant directly inflicted unjustifiable physical pain or mental suffering. Give element 1B if it is alleged that the defendant caused or permitted an elder or dependent adult to suffer. If it is alleged that the defendant had care or custody of an elder or dependent adult and that the defendant caused or permitted the elder's or dependent adult's person or health to be injured, give element 1C. Finally, give element 1D if it is alleged that the defendant had care or custody of an elder or dependent adult and that the defendant endangered the elder's or dependent adult's person or health. (See Pen. Code, § 368(b)(1).)

Give bracketed element 4, stating the defendant knew or should have known the victim was a dependent adult, if either element 1A or 1B is chosen. Under Penal Code section 368(b)(1), knowledge that a person is an elder or dependent adult is required when alleging that a non-caretaker defendant caused or permitted such person to suffer pain or mental suffering, or directly inflicted such suffering. Alternatively, the trial court may prefer to read section 368(b)(1) more broadly and always give element 4 until there is further guidance from the appellate courts. (See *People v. Superior Court (Holvey)* (1988) 205 Cal.App.3d 51, 58, 62 [dictum; allowing prosecution to amend the complaint to make "requisite allegation" that defendants had knowledge that the victim was a dependent adult].)

Give bracketed element 5 if it is alleged under element 1B that the defendant *permitted* an elder or dependent adult to suffer unjustifiable pain or mental suffering. (See *People v. Heitzman* (1994) 9 Cal.4th 189, 212.) If element 5 is given, also give the bracketed paragraph defining who has a "legal duty to control the conduct of a third person."

Give bracketed element 6 regarding criminal negligence, and the bracketed definition of "criminally negligent," if element 1B, 1C, or 1D is given alleging that the defendant committed any indirect act. (*People v. Manis* (1992) 10 Cal.App.4th 110, 114; *People v. Superior Court (Holvey)* (1988) 205 Cal.App.3d 51, 60; see *People v. Valdez* (2002) 27 Cal.4th 778, 788, 789; *People v. Peabody* (1975) 46 Cal.App.3d 43, 48–49 [latter two cases in context of parallel child abuse statute].) The court may need to renumber element 6 if elements 4 and 5 are not given.

Give the bracketed definition of “elder” or “dependent adult” depending on the status of the alleged victim. (See Pen. Code, § 368(g) & (h).)

Give on request the bracketed definition of “unjustifiable” physical pain or mental suffering if there is a question about the necessity for or the degree of pain or suffering. (See *People v. Curtiss* (1931) 116 Cal.App. Supp. 771, 779–780.)

If there is a question whether an elder or dependent adult suffered great bodily harm, give on request the bracketed paragraph stating that a person “does not need to actually suffer great bodily harm.” (See *People v. Cortes* (1999) 71 Cal.App.4th 62, 80; *People v. Jaramillo* (1979) 98 Cal.App.3d 830, 835 [in context of parallel child abuse statute].)

If a victim actually suffers great bodily injury or dies, the defendant’s sentence is enhanced for specified periods depending on the victim’s age. (See Pen. Code, § 368(b)(2) & (3); see *People v. Adams* (2001) 93 Cal.App.4th 1192, 1198.) It appears the facts of the victim’s injury and age must be submitted to the jury. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged, submitted to a jury, and proved beyond a reasonable doubt].) Give the last bracketed paragraph on request if it is alleged that the victim actually suffered great bodily injury or died.

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

AUTHORITY

Elements ▶ Pen. Code, § 368(b)(1).

Great Bodily Harm or Injury Defined ▶ Pen. Code, §§ 368(b)(2), 12022.7(f); see *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [in context of parallel child abuse statute].

Sentence Enhancements ▶ Pen. Code, § 368(b)(2) & (3); see *People v. Adams* (2001) 93 Cal.App.4th 1192, 1198.

Willful Defined ▶ Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107; *People v. Vargas* (1988) 204 Cal.App.3d 1455, 1462, 1468–1469.

Criminal Negligence Required for Indirect Conduct ▶ *People v. Manis* (1992) 10 Cal.App.4th 110, 114; *People v. Superior Court (Holvey)* (1988) 205 Cal.App.3d 51, 60; see *People v. Valdez* (2002) 27 Cal.4th 778, 788, 789; *People v. Peabody* (1975) 46 Cal.App.3d 43, 47, 48–49 [in context of parallel child abuse statute].

Duty to Control Conduct of Person Inflicting Abuse ▶ *People v. Heitzman* (1994) 9 Cal.4th 189, 212.

General Criminal Intent Required for Direct Infliction of Pain or Suffering ▶ See *People v. Sargent* (1999) 19 Cal.4th 1206, 1224 [in context of parallel child abuse statute].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 168–170, pp. 462–466.

COMMENTARY

Willful Violation

Any violation of Penal Code section 368(b)(1) must be willful. (See *People v. Smith* (1984) 35 Cal.3d 798, 806; *People v. Cortes* (1999) 71 Cal.App.4th 62, 80 [both in context of parallel child abuse statute]; but see *People v. Valdez* (2002) 27 Cal.4th 778, 789 [the prong punishing a *direct infliction* of unjustifiable physical pain or mental suffering does not expressly require that the conduct be willful].) Following *Smith* and *Cortes*, the committee has included “willfully” in element 1A regarding direct infliction of abuse until there is further guidance from the courts.

LESSER INCLUDED OFFENSES

Attempted Abuse of Elder or Dependent Adult ▶ Pen. Code, §§ 664, 368(b)(1).
Misdemeanor Abuse of Elder or Dependent Adult ▶ Pen. Code, § 368(c).

RELATED ISSUES

Care or Custody

“The terms ‘care or custody’ do not imply a familial relationship but only a willingness to assume duties correspondent to the role of a caregiver.” (See *People v. Toney* (1999) 76 Cal.App.4th 618, 621–622 [quoting *People v. Cochran* (1998) 62 Cal.App.4th 826, 832; both in context of parallel child abuse statute].)

Unanimity on Particular Acts Not Required

Penal Code section 368 may be violated by a continuous course of conduct. (*People v. Rae* (2002) 102 Cal.App.4th 116, 123 [wrongful acts were successive, compounding, and interrelated].) When a single course of conduct is established, the jury should not be instructed that they need to agree unanimously that the

defendant committed any particular act or acts. The jury need only agree unanimously that the defendant engaged in the prohibited conduct. (See *People v. Culuko* (2000) 78 Cal.App.4th 307, 325; *People v. Vargas* (1988) 204 Cal.App.3d 1455, 1462–1463, 1464 [in context of parallel child abuse statute].)

STAFF NOTES

Elements

Penal Code section 368(b) [as amended by Stats. 2002, ch. 369] defines the crime of felony elder abuse as follows:

(b)(1) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult, with knowledge that he or she is an elder or a dependent adult, to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health is endangered, is punishable by imprisonment in a county jail not exceeding one year, or by a fine not to exceed six thousand dollars (\$6,000), or by both that fine and imprisonment, or by imprisonment in the state prison for two, three, or four years.

(2) If in the commission of an offense described in paragraph (1), the victim suffers great bodily injury, as defined in Section 12022.7, the defendant shall receive an additional term in the state prison as follows:

(A) Three years if the victim is under 70 years of age.

(B) Five years if the victim is 70 years of age or older.

(3) If in the commission of an offense described in paragraph (1), the defendant proximately causes the death of the victim, the defendant shall receive an additional term in the state prison as follows:

(A) Five years if the victim is under 70 years of age.

(B) Seven years if the victim is 70 years of age or older.

“Section 368 was patterned on and is virtually identical to [Penal Code] section 273a. Cases interpreting one section are therefore appropriately used to interpret the other.” (*People v. Sargent* (1999) 19 Cal.4th 1206, 1216, fn. 6.) See the Staff Notes to instruction 920, Child Abuse Likely to Produce Great Bodily Harm or Death.

Mens Rea

See the discussion in the Staff Notes to instruction 920, Child Abuse Likely to Produce Great Bodily Harm or Death.

Duty to Control Conduct of Third Person

The court in *People v. Heitzman* (1994) 9 Cal.4th 189, 207, held that Penal Code section 368(a) fails to provide fair notice to persons who may be subject to criminal liability for “willfully . . . permit[ting]” an elder or dependent adult to

suffer pain, and fails to set forth a uniform standard under which police and prosecutors can consistently enforce the proscription against willfully permitting such suffering. But the court upheld the statute by interpreting that proscription to apply only to a person who, under existing tort principles, has a duty to control the conduct of the individual who directly caused or inflicted the abuse (*id.* at pp. 212–213 [original italics]):

[A] special relationship between the defendant and the person inflicting pain or suffering on the elder does provide the basis for a reasonable and practical interpretation of the statutory language at issue here. Under such a statutory construction, in order for criminal liability to arise for *permitting* an elder to suffer unjustifiable pain or suffering, a defendant must stand in a special relationship to the individual inflicting the abuse on the elder such that the defendant is under an existing duty to supervise and control that individual's conduct. . . .

The Restatement Second of Torts provides guidance as to both the nature and the scope of the special relationships that would give rise to a duty to prevent an individual from inflicting pain or suffering on an elder, pursuant to section 368(a). These special relationships are defined as those between (1) parent and minor child, (2) employer and employee, (3) landowner and licensee, and (4) "[o]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled" (Rest.2d Torts, § 316-319, pp. 123-130.) Case law applying and refining the "duty to control" principles serves as a further guide to determining when, under section 368(a), an individual may be held criminally liable for the failure to control the conduct of an individual who inflicts pain or suffering on an elder. [Citation omitted.]

For example, as to the individual who takes charge of a third person whom he or she knows or should know is likely to cause bodily harm to others if not controlled [citation omitted], under existing principles of tort law, in order for one to "take charge" of a person such that a legal duty to control his or her conduct is created, one must possess the *ability* to control. [Citation omitted.] When such ability does not exist, no duty arises, rendering inactionable a civil claim against a defendant for the failure to control the conduct of another. [Citations omitted.] From this it follows that one will be *criminally* liable for the abusive conduct of another only if he or she has the *ability* to control such conduct.

The fact that courts have narrowly construed section 368(a) to require proof of criminal negligence does not alleviate the need to establish a duty to prevent abuse (*id.* at p. 208, original italics):

Thus, *Manis* and *Holvey* demonstrate only that, by reading into section 368(a) the requirement of criminal negligence, the *standard of conduct* required by the statute can be made sufficiently certain. The requirement of criminal negligence, standing alone, however, does not remedy the uncertainty of section 368(a). It simply clarifies the standard by which to determine whether the duty to prevent elder abuse, once established, has been breached.

Elder Defined

Penal Code section 368(g) defines “elder”:

(g) As used in this section, "elder" means any person who is 65 years of age or older.

The definition in the instruction is copied from instruction 1314, Theft from Elder or Dependent Adult, which is based on a statute with an identical definition.

Dependent Adult Defined

Penal Code section 368(h) defines “dependent adult”:

(h) As used in this section, "dependent adult" means any person who is between the ages of 18 and 64, who has physical or mental limitations which restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age. "Dependent adult" includes any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

The definition in the instruction is copied from instruction 1314, Theft from Elder or Dependent Adult, which is based on a statute with an identical definition.

Great Bodily Harm Defined

See the discussion in the Staff Notes to instruction 920, Child Abuse Likely to Produce Great Bodily Harm or Death.

924. Inflicting Injury on Spouse, Cohabitant, or Parent
Resulting in Traumatic Condition

1 The defendant is charged [in Count __] with inflicting an injury on [his/her]
2 ([former] spouse/ [former] cohabitant/the (mother/father) of (his/her) child)
3 that resulted in a traumatic condition.

4
5 To convict the defendant of this crime, the People must prove that:

- 6
7 1. The defendant willfully inflicted a physical injury on [his/her]
8 ([former] spouse/ [former] cohabitant/the (mother/father) of
9 (his/her) child).

10
11 AND

- 12
13 2. The injury inflicted by the defendant resulted in a traumatic
14 condition.

15
16 Someone commits an act *willfully* when he or she does it willingly or on
17 purpose. It is not required that he or she intend to break the law, hurt
18 someone else, or gain any advantage.

19
20 A *traumatic condition* is a wound or other bodily injury, whether minor
21 or serious, caused by the direct application of physical force.

22
23 [Cohabitants are unrelated persons who live together in a substantial
24 relationship. A substantial relationship may be shown, at a minimum, by
25 some permanence and by sexual or amorous intimacy.] [It is not required
26 that a person hold (himself/herself) out to be the (husband/wife) of the person
27 with whom (he/she) is cohabiting.] [A person may cohabit simultaneously
28 with two or more people at different locations, during the same time frame, if
29 he or she maintains substantial ongoing relationships with each person and
30 lives with each person for significant periods.]

31
32 [A person is considered to be the (mother/father) of another person's child if
33 the alleged male parent is presumed under law to be the natural father.
34 _____ <insert name of presumed father> is presumed under law to be the
35 natural father of _____ <insert name of child>.]

36
37 [A traumatic condition is the *result* of an injury if the traumatic condition was
38 the natural and probable consequence of the injury and the injury was a

39 **direct and substantial factor in causing the condition[, and if the condition**
40 **would not have happened without the injury].]** [In order for a factor to have
41 **been *substantial*, it must have been more than a trivial or remote factor.**
42 **However, it does not need to have been the only factor that caused the**
43 **traumatic condition.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

In the paragraph defining “cohabitants,” give the second bracketed sentence on request if the cohabitants did not hold themselves out as husband and wife. (See Pen. Code, § 273.5(b).) Give the third bracketed sentence on request if there is evidence that the defendant cohabited with two or more persons. (See *People v. Moore* (1996) 44 Cal.App.4th 1323, 1335.)

Give on request the bracketed paragraph that begins “A person is considered to be the (mother/father)” if an alleged parental relationship is based on the statutory presumption that the male parent is the natural father. (See Pen. Code, § 273.5(d); see also *People v. Vega* (1995) 33 Cal.App.4th 706, 711 [parentage can be established without resort to any presumption].)

Give on request the first bracketed sentence of the next paragraph to define when a traumatic condition is “the *result of* an injury.” Give on request the bracketed phrase “and if the condition would not have happened without the injury” if it is undisputed that there is potentially only one injury that caused the traumatic condition. Give on request the final two bracketed sentences defining “substantial” if there is potentially more than one injury that caused the condition.

If there is substantial evidence that a victim’s injuries were caused by an accident and the defense is not inconsistent with the defendant’s theory of the case, or if it appears that the defendant is relying on that defense, the trial court has a **sua sponte** duty to instruct on accident. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 390; see Instruction 620, Accident and Misfortune.)

Related Instruction

Instruction 925, Inflicting Injury on Spouse, Cohabitant, or Parent Resulting in Traumatic Condition—Enhancement for Prior Conviction Within Seven Years.

AUTHORITY

- Elements ▶ Pen. Code, § 273.5(a).
- Traumatic Condition Defined ▶ Pen. Code, § 273.5(c); *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952.
- Willful Defined ▶ Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107.
- Cohabitant Defined ▶ *People v. Holifield* (1988) 205 Cal.App.3d 993, 1000; *People v. Ballard* (1988) 203 Cal.App.3d 311, 318–319.
- Direct Application of Force ▶ *People v. Jackson* (2000) 77 Cal.App.4th 574, 580.
- Duty to Define Traumatic Condition ▶ *People v. Burns* (1948) 88 Cal.App.2d 867, 873–874.
- General Intent Crime ▶ See *People v. Thurston* (1999) 71 Cal.App.4th 1050, 1055; *People v. Campbell* (1999) 76 Cal.App.4th 305, 318; contra, *People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1402 [dictum].
- Simultaneous Cohabitation ▶ *People v. Moore* (1996) 44 Cal.App.4th 1323, 1335.
- 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 63, 64, pp. 680–683.

LESSER INCLUDED OFFENSES

- Attempted Infliction of Corporal Punishment on Spouse ▶ Pen. Code, §§ 664, 273.5(a); *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1627, 1628 [attempt requires intent to cause traumatic condition, but does not require a resulting “traumatic condition”].
- Misdemeanor Battery ▶ Pen. Code, §§ 242, 243(a); see *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952.
- Battery Against Spouse, Cohabitant, or Fellow Parent ▶ Pen. Code, § 243(e)(1); see *People v. Jackson* (2000) 77 Cal.App.4th 574, 580.
- Simple Assault ▶ Pen. Code, §§ 240, 241(a); *People v. Van Os* (1950) 96 Cal.App.2d 204, 206.

RELATED ISSUES

Continuous Course of Conduct

Penal Code section 273.5 is aimed at a continuous course of conduct. The prosecutor is not required to choose a particular act and the jury is not required to unanimously agree on the same act or acts before a guilty verdict can be returned. (*People v. Thompson* (1984) 160 Cal.App.3d 220, 224–225.)

Multiple Acts of Abuse

A defendant can be charged with multiple violations of Penal Code section 273.5 when each battery satisfies the elements of section 273.5. (*People v. Healy* (1993) 14 Cal.App.4th 1137, 1140.)

Prospective Parents of Unborn Children

Penal Code section 273.5(a) does not apply to a man who inflicts an injury upon a woman who is pregnant with his unborn child. “A pregnant woman is not a ‘mother’ and a fetus is not a ‘child’ as those terms are used in that section.” (*People v. Ward* (1998) 62 Cal.App.4th 122, 126, 129.)

Termination of Parental Rights

Penal Code section 273.5 “applies to a man who batters the mother of his child even after parental rights to that child have been terminated.” (*People v. Mora* (1996) 51 Cal.App.4th 1349, 1356.)

STAFF NOTES

Elements

Penal Code section 273.5(a) defines this offense:

(a) Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars (\$ 6,000) or by both that fine and imprisonment.

Direct Application of Force

To “inflict” corporal injury under section 273.5 requires a direct application of force, as held in *People v. Jackson* (2000) 77 Cal.App.4th 574, 580:

[I]f the Legislature had defined Penal Code section 273.5 in broader terms, rather than “willfully inflicts,” we would conclude that it intended to extend criminal liability to the direct, natural and probable consequences of the battery. Since it appears that the Legislature intended section 273.5 to define a very particular battery, we conclude the section is not violated unless the corporal injury results from a direct application of force on the victim by the defendant.

General Intent

An offense under Penal Code section 273.5(a) is a general intent crime, as held in *People v. Thurston* (1999) 71 Cal.App.4th 1050, 1055 [original italics]:

Section 273.5, subdivision (a) uses no other language of intent than the word “willfully,” specifying only that the act done *result* in a “traumatic condition.” Consequently, its terms come within the general rule that statutes proscribing willful behavior are general intent crimes. [Citation.] . . . [W]e hold that spousal injury, section 273.5, subdivision (a) requires only the mens rea of intending to do the assaultive act.

Traumatic Condition Defined

Penal Code section 273.5(c) defines “traumatic condition”:

(c) As used in this section, "traumatic condition" means a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by a physical force.

Some corporal injury is required, as discussed in *People v. Abrego* (1993) 21 Cal.App.4th 133, 137–138 [original italics]:

“It is *injury* resulting in a traumatic condition that differentiates this crime from lesser offenses. . . .” (*Gutierrez, supra*, 171 Cal.App.3d at p. 952.) [¶] The People argue that the soreness and tenderness [the victim] experienced were sufficient to constitute a traumatic condition within the meaning of section 273.5. However, as the *Gutierrez* court explained, the statute requires *injury* from a traumatic condition, even though the injury may be minor. The record discloses no evidence of even a minor injury sufficient to satisfy the statutory definition.

The court in *Abrego* noted that the victim testified “she had not been injured or bruised, and she did not seek medical treatment.” (*Abrego, supra*, at p. 136.) Pain alone “is insufficient to constitute a traumatic condition within the meaning of Penal Code section 273.5.” (*People v. Beasley* (2003, B160513) __ Cal.App.4th __.)

The duty to define “traumatic condition” was recognized in *People v. Burns* (1948) 88 Cal.App.2d 867, 873:

We are of the opinion that the court should have given, on its own motion, an instruction to the jury defining and advising them as to what, in contemplation of law, constitutes “a traumatic condition.”

Cohabitant Defined

People v. Moore (1996) 44 Cal.App.4th 1323, 1333–1335 discusses the meaning of cohabiting and whether someone can simultaneously cohabit with two more people:

We must . . . determine whether simultaneous cohabitation may exist as a matter of law for purposes of conviction under [Penal Code] section 273.5. . . . “[C]ohabiting” under section 273.5 means an unrelated man and woman living together in a substantial relationship—one manifested, minimally, by permanence and sexual or amorous intimacy.” (*Holifield, supra*, at p. 1000.) . . . We conclude as a matter of law that for purposes of criminal liability under section 273.5, a defendant may cohabit simultaneously with two or more people at different locations, during the same time frame, if he maintains substantial ongoing relationships with each and lives with each for significant periods.

In 1994, the Legislature deleted the reference to persons of the opposite sex. “[I]t appears the Legislature intended to extend its protection to domestic partners, regardless of gender.” (*Moore, supra*, at p. 1334.)

Moore quoted *Holifield*, which discussed “cohabit” as follows:

We do think that section 273.5 requires something more than a platonic, rooming-house arrangement. *Ballard* speaks of a “significant relationship” by analogy to the domestic violence act provisions. [Citation omitted.] Because those provisions appear limited to amorous and/or sexually intimate relationships ([Pen. Code,] § 13700, subd. (b)), it is logical to ascribe a similar limitation to section 273.5.

Penal Code section 13700(b) defines “cohabitant” for purposes of law enforcement response to domestic violence as follows:

For purposes of this subdivision, “cohabitant” means two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship. Factors that may determine whether persons are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same living quarters, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) whether the parties hold themselves out as husband and wife, (5) the continuity of the relationship, and (6) the length of the relationship.

The definition adopted in *Moore*, *Holifield*, and *Ballard* places more emphasis on the relationship being manifested by permanence and “sexual or amorous intimacy,” although sexual relations is only one of six potential factors in section 13700(b). Instruction 924 adheres to the language in *Moore*, *Holifield*, and *Ballard*.

Cohabitation does not require holding oneself out to be a husband or wife, as stated in Penal Code section 273.5(b):

(b) Holding oneself out to be the husband or wife of the person with whom one is cohabiting is not necessary to constitute cohabitation as the term is used in this section.

Cohabitation is not a necessary element of the offense for married persons. (*People v. Gutierrez* (1985) 171 Cal.App.3d 944, 951.)

Direct and Concurrent Causes

To define “as a result of” an injury inflicted by the defendant, this instruction incorporates a shortened version of the definitions of direct and concurrent causes from instruction 728, Homicide: Provocative Act by Defendant.

925. Inflicting Injury on Spouse, Cohabitant, or Parent Resulting in Traumatic Condition—Enhancement for Prior Conviction Within Seven Years

1 **If you find the defendant guilty of inflicting an injury on [his/her] ([former]**
2 **spouse/[former] cohabitant/the (mother/father) of (his/her) child) that**
3 **resulted in a traumatic condition [under Count ____], you must then**
4 **determine whether the People have proved the additional allegation that the**
5 **defendant was convicted withi n the past seven years of a related crime.**

6
7 **To prove this additional allegation, the People must prove that:**

8
9 *<Choose the appropriate prior conviction being charged.>*

10
11 *<Alternative A—prior § 273.5>*

12 **[The defendant was previously convicted on or before _____**
13 *<insert date of prior conviction that occurred within seven years of the date*
14 *the defendant committed the current offense> of inflicting an injury on*
15 **[his/her] ([former] spouse/[former] cohabitant/the (mother/father) of**
16 **(his/her) child) that resulted in a traumatic condition, in violation of**
17 **Penal Code section 273.5(a).]**

18
19 *<Alternative B—prior § 243(d)>*

20 **[The defendant was previously convicted on or before _____**
21 *<insert date of prior conviction that occurred within seven years of the date*
22 *the defendant committed the current offense> of battery causing serious*
23 **bodily injury, in violation of Penal Code section 243(d).]**

24
25 *<Alternative C—prior § 243.4>*

26 **[The defendant was previously convicted on or before _____**
27 *<insert date of prior conviction that occurred within seven years of the date*
28 *the defendant committed the current offense> of sexual battery, in*
29 **violation of Penal Code section 243.4.]**

30
31 *<Alternative D—prior § 244>*

32 **[The defendant was previously convicted on or before _____**
33 *<insert date of prior conviction that occurred within seven years of the date*
34 *the defendant committed the current offense> of assault with caustic*
35 **chemicals or flammable substances, in violation of Penal Code section**
36 **244.]**

39 <Alternative E—prior § 244.5>

40 [The defendant was previously convicted on or before _____

41 <insert date of prior conviction that occurred within seven years of the date
42 the defendant committed the current offense> of assault with a (stun
43 gun/Taser®), in violation of Penal Code section 244.5.]

44
45 <Alternative F—prior § 245(a) or (b)>

46 [The defendant was previously convicted on or before _____

47 <insert date of prior conviction that occurred within seven years of the date
48 the defendant committed the current offense> of assault with (force likely
49 to produce great bodily injury/a deadly weapon other than a firearm/a
50 firearm/a semiautomatic firearm/a machine gun/an assault weapon), in
51 violation of Penal Code section 245((a)/(b)).]

52
53 <Alternative G—prior § 245(c) or (d)>

54 [The defendant was previously convicted on or before _____

55 <insert date of prior conviction that occurred within seven years of the date
56 the defendant committed the current offense> of assault with (force likely
57 to produce great bodily injury/a deadly weapon other than a firearm/a
58 firearm/a semiautomatic firearm/a machine gun/an assault weapon) on
59 a (firefighter/peace officer), in violation of Penal Code section
60 245((c)/(d)).]

61
62 **The People have the burden of proving this allegation beyond a reasonable**
63 **doubt. If the People have not met this burden, you must find that this**
64 **additional allegation has not been proved.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the enhancement. (See *People v. Marshall* (2000) 83 Cal.App.4th 186, 193–195 [applying *Apprendi* to firearm use enhancement]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged, submitted to a jury, and proved beyond a reasonable doubt].)

This instruction **must** be given with Instruction 924, Inflicting Injury on Spouse, Cohabitant, or Parent Resulting in Traumatic Condition, defining the elements of the offense.

AUTHORITY

Previous Conviction Within Seven Years ▶ Pen. Code, § 273.5(e).

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 63, 64, pp. 680–683.

STAFF NOTES

Previous Convictions Within Seven Years

Longer state prison terms are available if the defendant was convicted within seven years of specified, related offenses, as set forth in Penal Code section 273.5(e):

(e) Any person convicted of violating this section for acts occurring within seven years of a previous conviction under subdivision (a), or subdivision (d) of Section 243, or Section 243.4, 244, 244.5, or 245, shall be punished by imprisonment in a county jail for not more than one year, or by imprisonment in the state prison for two, four, or five years, or by both imprisonment and a fine of up to ten thousand dollars (\$ 10,000).

Alternative paragraphs A–G allege each of these possible prior convictions.

930. Testimony on Battered Women's Syndrome:
Credibility of Complaining Witness

1 **You have heard testimony from _____** *<insert name of expert>*
2 **regarding battered women's syndrome.**

3
4 _____'s *<insert name of expert>* **testimony about battered women's**
5 **syndrome is not evidence that the defendant committed any of the crimes**
6 **charged against (him/her).**

7
8 **You may consider this evidence only in deciding whether or not _____'s**
9 ***<insert name of alleged victim of abuse>* conduct was not inconsistent with the**
10 **conduct of someone who has been abused, and in evaluating the believability**
11 **of her testimony.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if an expert testifies on battered women's syndrome. (See *People v. Housley* (1992) 6 Cal.App.4th 947, 958–959 [sua sponte duty in context of child sexual abuse accommodation syndrome]; *People v. Bledsoe* (1984) 36 Cal.3d 236, 250 [rape trauma syndrome not admissible to prove rape occurred].)

Related Instructions

If this instruction is given, also give Instruction 330, Limited Purpose Evidence in General and Instruction 450, Expert Witness: Factual Basis in Dispute.

Instruction 931, Testimony on Battered Women's Syndrome: Offered by the
Defense

AUTHORITY

Instructional Requirements ▶ See Evid. Code, § 1107(a); *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088, fn. 5.

Abuse Defined ▶ Evid. Code, § 1107(c); Fam. Code, § 6203.

Domestic Violence Defined ▶ Evid. Code, § 1107(c); Fam. Code, § 6211.

- Relevant After Single Incident of Abuse ▶ *People v. Williams* (2000) 78 Cal.App.4th 1118, 1129; contra, *People v. Gomez* (1999) 72 Cal.App.4th 405, 416–417.
- Relevant to Rehabilitate Victim’s Credibility ▶ *People v. Gadlin* (2000) 78 Cal.App.4th 587, 594–595 [victim recanted incident and reunited with abuser]; *People v. Morgan* (1997) 58 Cal.App.4th 1210, 1215–1217 [victim recanted].
- 1 Witkin, Cal. Evidence (4th ed. 2000) Opinion Evidence, §§ 48–51, pp. 582–588.

RELATED ISSUES

Assumptions Underlying Expert Testimony

It is unnecessary, and potentially misleading, to instruct that the expert testimony assumes that physical or mental abuse has in fact occurred. (See *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1387 [in context of child sexual abuse accommodation syndrome].)

Definition and Preferred Name

Battered women’s syndrome has been defined as “a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives.” (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1083–1084.) Experts prefer to call the syndrome “expert testimony on battered women’s experiences.” (See *People v. Humphrey*, *supra*, 13 Cal.4th at pp. 1083–1084, fn. 3.) Although section 1107 of the Evidence Code states that it should be cited as the Expert Witness Testimony on Battered Women’s Experiences Section of the Evidence Code (Evid. Code, § 1107(e)), section 1107(a) still uses the term “battered women’s syndrome.”

No Testimony on Actual State of Mind

While syndrome evidence is admissible “to explain how [a] defendant’s asserted subjective perception of a need to defend herself ‘would reasonably follow from the defendant’s experience as a battered woman,’ ” an expert may not give an opinion “that the defendant *actually perceived* that she was in danger and needed to defend herself.” (*People v. Erickson* (1997) 57 Cal.App.4th 1391, 1400, 1401 [§ 1107(a) codifies existing rules regarding battered women’s syndrome testimony; original italics].) Section 1107 “does not create an exception to Penal Code section 29,” which prohibits an expert who is testifying about a mental defect from testifying about whether a defendant had a required mental state. (*People v. Erickson*, *supra*, 57 Cal.App.4th at pp. 1401–1402 [syndrome was characterized as mental defect].)

STAFF NOTES

Introduction—Admission and Definition of Battered Women’s Syndrome Evidence

Evidence code section 1107(a) provides [italics added]:

(a) In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding battered women's syndrome, including *the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence . . .*

The syndrome was also defined in *People v. Gomez* (1999) 72 Cal.App.4th 405, 416:

[T]he [*Humphrey*] court recognized that "[b]attered women's syndrome 'has been defined as 'a series of common characteristics that appear in women who are abused physically and psychologically over an *extended period of time* by the dominant male figure in their lives.' " ([*Humphrey, supra*, 13 Cal.4th] at pp. 1083-1084 . . . (italics added) . . .)

“[S]uch syndrome evidence has been admitted solely to disabuse jurors of ‘common sense’ misconceptions about the behavior of persons in the affected groups, such as rape victims and abused children, and not to prove a fact in issue.” (*People v. Erickson* (1997) 57 Cal.App.4th 1391, 1401.) BWS evidence is relevant “to explain a behavior pattern that might otherwise appear unreasonable to the average person. Evidence of BWS not only explains how a battered woman might think, react, or behave, it places the behavior in an understandable light.” (*People v. Day* (1992) 2 Cal.App.4th 405, 419.)

Instruction 930 does not define BWS to avoid characterizing expert testimony that already defined the term.

—Abuse and Domestic Violence Defined

Section 1107 (c) provides in part:

(c) For purposes of this section, "abuse" is defined in Section 6203 of the Family Code and "domestic violence" is defined in Section 6211 of the Family Code or acts defined in Section 242, subdivision (e) of Section 243, or Section 262, 273.5, 273.6, 422, or 653m of the Penal Code.

Family Code section 6203 defines “abuse.” Family Code section 6211 defines “domestic violence.” Family Code section 6209 defines “cohabitant.” Family Code section 6320 (which is referred to in the abuse definition) defines conduct

that may be enjoined. Since the jury will only hear the instruction after expert testimony was admitted, it does not appear necessary to define these terms in instruction 930.

Syndrome Evidence Not Available to Prove Guilt

Evidence Code section 1107(a) states that expert testimony may not be “offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.”

A limiting instruction about not using BWS evidence to prove guilt should be given if the prosecution introduced the evidence, as suggested in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088, fn. 5:

If the prosecution offers the battered women’s syndrome evidence, an additional limiting instruction might also be appropriate on request, given the statutory prohibition against use of this evidence “to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.” (Evid. Code, § 1107, subd. (a); see CALJIC No. 9.35.01 (1996 new) (5th ed. Supp.).)

Relevant to Victim’s or Defendant’s Credibility

Battered women’s syndrome evidence is relevant to rehabilitate the credibility of an abuse victim, as discussed in *People v. Gadlin* (2000) 78 Cal.App.4th 587, 594–595:

BWS evidence speaks directly to both recantation and reunion by a domestic abuse victim, especially where such actions are used to attack her credibility. . . . Defendant also contends BWS testimony was not probative on the present facts because the victim testified she and defendant worked together to falsify the recantation letter We disagree. . . . BWS evidence is relevant to the motive for a victim’s recantation, regardless of its mechanics.

BWS evidence may also be relevant to a defendant’s credibility, as discussed in *People v. Jaspar* (2002) 98 Cal.App.4th 99, 107:

BWS evidence is relevant to a defendant’s credibility because it assists “ ‘the jury in objectively analyzing [the defendant’s] claim of self-defense by dispelling many of the commonly held misconceptions about battered women.’ ” (*People v. Humphrey, supra*, 13 Cal.4th at p. 1087 . . .)

This instruction tells the jury it may consider BWS evidence in evaluating the witness's "believability." This language is adapted from instruction 130, Witnesses, which provides:

1. You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. . . .

Relevant After Single Incident of Domestic Violence

Expert testimony is relevant on rebuttal after the credibility of a victim of a single incident of domestic violence is placed in issue, as held in *People v. Williams* (2000) 78 Cal.App.4th 1118, 1129:

In the context of the reason for admission of the evidence in this case, we disagree with the limitation placed on admission of evidence pursuant to . . . section 1107 in . . . *Gomez*. There is nothing in . . . section 1107 to suggest that the Legislature intended that a batterer get one free episode of domestic violence before admission of evidence to explain why a victim of domestic violence may make inconsistent statements about what occurred and why such a victim may return to the perpetrator.

Underlying Factual Assumption

It is not required to state in the instruction that the expert testimony assumes that domestic violence in fact has occurred for purposes of illustration, as discussed in *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1387, in the context of child molestation:

As part of the final instructions to the jury, the court said "[y]ou are reminded that testimony of [the expert] was offered and may be considered by you only for the purpose of understanding and explaining the behavior of one or more of the alleged victims in this case, and not as proof that the molestation occurred as to anyone or more of the alleged victims." [¶] [The defendant] complains that these instructions did not advise the jury that evidence of this kind "*assumes* that a molestation has in fact occurred and that the complaining witnesses['] reactions were common explanations of a factual event," and therefore the jury was allowed to use the evidence "without being fully instructed that this evidence is premised on a molestation having in fact occurred." [¶] There was no error. [The defendant]'s argument is based on explanatory language, in *Bowker*, which in our view was patently intended to make the opinion clear to the attorney or judge who read it and not to be incorporated (at least in the unelaborated form [the defendant] suggests) in an instruction to the jury. The instructions the trial court gave were clear, accurate, and sufficient. We would consider

it unnecessary, and potentially confusing and misleading, to add the language [the defendant] proposes.

931. Testimony on Battered Women's Syndrome: Offered by the Defense

1 **You have heard testimony from _____ <insert name of expert>**
2 **regarding battered women's syndrome.**

3
4 _____'s <insert name of expert> **testimony about battered women's**
5 **syndrome is not evidence that the defendant committed any of the crimes**
6 **charged against her.**

7
8 **You may consider this evidence only in deciding whether the defendant**
9 **actually believed she needed to defend herself against an immediate threat of**
10 **great bodily injury or death, and whether that belief was reasonable or**
11 **unreasonable.**

12
13 **When deciding whether the defendant's belief was reasonable or**
14 **unreasonable, consider all the circumstances as they were known by or**
15 **appeared to the defendant. Also consider what conduct would appear to be**
16 **necessary to a reasonable person in a similar situation with similar**
17 **knowledge.**

18
19 **[Great bodily injury means significant or substantial physical injury.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if an expert testifies on battered women's syndrome. (See *People v. Housley* (1992) 6 Cal.App.4th 947, 958–959 [sua sponte duty in context of child sexual abuse accommodation syndrome]; *People v. Bledsoe* (1984) 36 Cal.3d 236, 250 [rape trauma syndrome not admissible to prove rape occurred].)

Related Instructions

If this instruction is given, also give Instruction 330, Limited Purpose Evidence in General and Instruction 450, Expert Witness: Factual Basis in Dispute.

Instruction 930, Testimony on Battered Women's Syndrome: Credibility of
Complaining Witness

Instruction 701, Justifiable Homicide: Self-Defense or Defense of Another

Instruction 751, Voluntary Manslaughter: Imperfect Self-Defense

AUTHORITY

Instructional Requirements ▶ See Evid. Code, § 1107(a); *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088, fn. 5; *People v. Jaspar* (2002) 98 Cal.App.4th 99, 111, fn. 6.

Abuse Defined ▶ Evid. Code, § 1107(c); Fam. Code, § 6203.

Domestic Violence Defined ▶ Evid. Code, § 1107(c); Fam. Code, § 6211.

Relevant After Single Incident of Abuse ▶ *People v. Williams* (2000) 78 Cal.App.4th 1118, 1129; contra, *People v. Gomez* (1999) 72 Cal.App.4th 405, 416–417.

Relevant to Claim of Self-Defense ▶ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082–1083, 1088–1089.

1 Witkin, Cal. Evidence (4th ed. 2000) Opinion Evidence, §§ 48–51, pp. 582–588.

RELATED ISSUES

See the Related Issues section of Instruction 930, Testimony on Battered Women's Syndrome: Credibility of Complaining Witness.

STAFF NOTES

See generally the staff notes to instruction 930, Testimony on Battered Women's Syndrome: Credibility of Complaining Witness.

Relevant to Actual Belief and Reasonableness of Belief in Self-Defense

Expert evidence of battered women's syndrome is relevant not only in deciding whether a defendant/victim actually believed she needed to kill in self-defense, but also in deciding the reasonableness of that belief, as held in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1084, 1088–1089:

We . . . hold that evidence of battered women's syndrome is generally *relevant* to the reasonableness, as well as the subjective existence, of defendants belief in the need to defend, and, to the extent it is relevant, the jury may *consider* it in deciding both questions. [Italics in original.]

Humphrey explained that it was not adopting a reasonable “battered woman” standard (*Id.* at p. 1087):

The jury must consider defendant's situation and knowledge, which makes the evidence relevant, but the ultimate question is whether a reasonable *person*, not a reasonable battered woman, would believe in the need to kill to prevent imminent harm. Moreover, it is the *jury*, not the expert, that determines whether defendant's belief and, ultimately, her actions, were objectively reasonable. [Italics in original.]

To emphasize that BWS evidence may be used to evaluate claims of both perfect and imperfect self-defense, the instruction uses the phrase “reasonable or unreasonable” belief, as suggested by *People v. Jaspar* (2002) 98 Cal.App.4th 99, 111, fn. 6 [original italics]:

We suggest that in future cases the bracketed language of CALJIC No. 9.35.1 concerning the fourth limited purpose for which BWS should be considered would be improved by changing “*whether the defendant actually and reasonably believed in the necessity to use force to defend herself against imminent peril to life or great bodily injury*” to read “*whether the defendant actually believed in the necessity to use force to defend herself against imminent peril to life or great bodily injury and whether such belief was reasonable or unreasonable.*”

The definition of “reasonable or unreasonable” belief is adapted from instruction 701, Justifiable Homicide: Self-Defense or Defense of Another, which provides:

When deciding whether the defendant's belief in the need for defense was reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what would appear necessary to a reasonable person in a similar situation with similar knowledge. In other words, consider what a reasonable person in the defendant's position would have believed. If the defendant's belief was reasonable, the danger need not have actually existed.

"Reasonable" does not mean the killing was an understandable response, as discussed in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088:

To dispel any possible confusion, it might be appropriate for the court, on request, to clarify that, in assessing reasonableness, the question is whether a reasonable person in the defendant's circumstances would have perceived a threat of imminent injury or death, and not whether killing the abuser was reasonable in the sense of being an understandable response to ongoing abuse; and that, therefore, in making that assessment, the jury may not consider evidence merely showing that an abused person's use of force against the abuser is understandable.